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The expansion of constitutional rights to public school pupils through the due process clause of the fourteenth amendment.

Hubert E. Saunders

University of Massachusetts Amherst

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THE EXPANSION OF CONSTITUTIONAL RIGHTS TO PUBLIC SCHOOL PUPILS 
THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A dissertation Presented

By

Hubert E. Saunders

Submitted to the Graduate School of the University of Massachusetts in partial fulfillment of the requirements for the degree of

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THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A Dissertation

by

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August, 1972
This work is dedicated to

Gail
Suzy
Stephie
Don
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CHAPTER I
INTRODUCTION

The idea that members of a society should be treated justly and fairly under the law is a fundamental tenant of legal philosophy. In order to guarantee this idea of fairness, the concept of due process of law has evolved. Due process of law can be found in the Fifth Amendment of the United States Constitution as the framers of this great document saw the need to restrain the Federal Government from depriving its citizens of life, liberty, or property, without due process of law. However, the use of the due process clause of the Fourteenth Amendment as a device to guarantee other constitutional rights is of fairly recent vintage.

The importance of the due process clause today cannot be overstated. It has been used by courts as the vehicle to extend constitutional protection to rich and poor, black and white, and young and old alike. Especially important in the eyes of the highest court has been the constitutional protection of "fundamental freedoms", such as free speech, process, religion, and assembly. Through a general expansion of the due process clause of the Fourteenth Amendment, the Supreme Court of the United States has ruled that most aspects of the Bill of Rights in the Federal Constitution are applicable to all citizens against state as well as federal impingement. These far-reaching decisions mean that the fundamental con-
cepts of fairness found in the Bill of Rights are sacrosanct and beyond any government's denial, as a matter of due process of law.

Bernard Schwartz says of the Fourteenth Amendment, "In the century since it became a part of the fundamental law, the Amendment has become, practically speaking, perhaps our most important constitutional provision - not even second in significance to the original basic document itself." ¹

On the subject of the due process clause, Justice Felix Frankfurter, one of the Supreme Court's most accomplished scholars asserted, "Due process is, perhaps the least frozen concept of our law - the least confined to history and the most absorptive of powerful standards of a progressive society." ² He also wrote that the, "Due process clause of the Fifth and particularly of the Fourteenth Amendment comes as close to providing a mechanism for dealing with the versatility of circumstance as is to be found in the Constitution."³

The mechanism for dealing with the versatility of circumstance, mentioned by Justice Frankfurter has given the Constitution the flexibility necessary for changing times. Just-

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tice Brandeis recognized this problem fifty years ago when he wrote, "Our Constitution is not a straightjacket. It is a living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic, and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things." This concept of "growth" of our Constitution suggested by Justice Brandeis has been accomplished in the area of individual rights to a considerable extent through a broad interpretation of the due process clause of the Fourteenth Amendment.

Whether it is a judicial philosophy of constitutional "growth" or the use of due process as a vehicle for dealing with versatility of circumstance, constitutional rights have been extended to a greater number of society's members in recent years. Within this broad legal framework which has seen the blanket of constitutional protection reaching many heretofore ignored, profound changes have resulted in the legal status of school students. Once the Supreme Court declared in the 1967 Gault case that, "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," new relationships between the student and the institutions of society inevitably developed. Children could, after 1967, no longer be

5. In Re Gault, 287 U.S. 1 (1967)
treated as non-citizens by the state. In a recent significant case relating to schools, Justice Fortas, speaking for the court said that, "First Amendment rights, applied in light of the special characteristic of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 6

The due process clause of the Fourteenth Amendment broadly interpreted has helped to open a door to a new body of Constitutional law, student's constitutional rights, the subject to be examined in this paper.

Need for the Study

Lee O. Garber, and Newton Edwards, possibly the two most eminent scholars in the field of school law, published a case book on student rights in 1962, called The Law Governing Pupils. In that volume, the authors point out that, "It is well established by many court decisions that school boards have authority to make and enforce any reasonable rules governing the conduct of pupils. Since 1966, however, this concept has dramatically changed as pupils have been winning suits in the federal courts on grounds their constitutional rights were

violated. Since a marked change in judicial philosophy has taken place in such a relatively short time, an analysis of this emerging decisional law is deemed necessary.

Literally hundreds of legal and pedagogical articles, position papers, books, and pamphlets have dealt with various aspects of student constitutional rights in recent years. Voluminous writing also has appeared in the related area of legal rights of college students. However, no study has dealt particularly with due process as the mainspring of the newly acquired rights of secondary school pupils. There is a need to examine the extent to which the trend toward judicial expansion of constitutional rights is part of a broader concept of the judicial extension of due process to all. Also, a study of student constitutional rights as they have evolved through a broad interpretation of the due process clause of the Fourteenth Amendment should help clarify recent court decisions for administrators and teachers in public education. Finally, conclusions drawn from this work might enhance the development of new relationships between the student and his educational institution, which in the long run will benefit all.

Purpose of the Study

Recognition and expansion of student constitutional rights has been having a tremendous impact on the public schools. Questions regarding the status of the law of stu-
dent rights, school policies, and administrative regulations affecting student freedoms have been raised with increased frequency. The primary purpose of this study is to determine through legal research and analysis, the impact of the due process clause of the Fourteenth Amendment on the constitutional rights of public school pupils. A secondary purpose is to update the substantive knowledge in the field of students' rights which should help educators understand the concept of due process as it might be made applicable to public school administration.

The Approach

Since a broad interpretation of the due process clause of the Fourteenth Amendment appears to have been a significant legal key in unlocking the door to student constitutional rights, the approach in this study will be to concentrate on the evolution of the due process clause as a means to guarantee constitutional rights to all people in general and to public school pupils in particular.

For convenience, the study will be divided into two parts. First, secondary sources such as legal periodicals, books, position papers, and pamphlets will be reviewed for specific points related to the topic. Secondly, the substance of the study itself will consist of an examination of all litigation reaching a court of record where students seek to evoke the due process clause of the Fourteenth Amendment for relief against invasion of constitutional freedoms.
Together, the primary and secondary sources will provide the basic content necessary for this study. For purposes of organization the basic substance of the study will be divided into chapters dealing with specific constitutional provisions: such as, First Amendment rights, searches and seizures outlined in the Fourth Amendment, and Fifth and Sixth Amendment procedural rights.

Delimitations

Involved in this study will be an examination of decisions of courts of record relating to the due process clause of the Fourteenth Amendment to the United States Constitution wherein the rights of public school pupils are adjudicated.

Cases arising in whole or in part out of the equal protection clause of the Fourteenth Amendment will not be considered only when a constitutional question is raised. Furthermore, decisions involving college students will be examined only where they are directly related to the question at hand, the due process rights of public school pupils. Finally, the issue of freedom of religion will not be included in this study of student constitutional rights.

Related Literature

Prior to 1968 the major publications on the constitutional rights of public school pupils were annual reviews of the important court decisions effecting their legal status.
Yearbook of School Law and The Student's Day in Court performed the task, with some editorial comment of keeping those interested abreast of the latest court decisions on student rights.

In 1968 Seymore Schwartz completed a doctoral dissertation on the topic, The Civil Liberties of the American Public School Student--An Examination of the Legal Aspects of Students' Rights and the Philosophical Implications for Curriculum Development. Chapter IV, titled "Legal Findings" reviewed and analyzed major court decisions on public school pupils' constitutional rights. Many of his conclusions had to be drawn without substantive legal decisions in the field of students' rights. However, Mr. Schwartz accurately predicted that subsequent court decisions would expand the scope of constitutional protection to students in the public schools. As the number of decisions affecting the legal status of students' rights grew, the amount of literature relating to the field proportionately increased.

There followed two important publications of position papers, one by the American Civil Liberties Union, the other by


8. The Student's Day in Court, N.E.A. Research Division, (Washington, D.C.)

9. Academic Freedom and Civil Liberties of Students in Colleges and Universities, American Civil Liberties Union, (New York, 1968)
The National Association of Secondary School Principals, that summarized the legal positions of the courts of student rights. Both papers suggested trends that have come about in the early 1970's.

The papers offered educational administrators guidelines in dealing with students so that they might avoid legal battles in court. The *Reasonable Exercise of Authority* in particular offered to principals the pragmatic advice on the legal status of student rights in 1969.

As evidence of the growing concern expressed by educators on the topic of student rights, the National Organization of Legal Problems of Education sponsored the publication of five volumes in a Monogram Series relating to a public school pupil's legal and constitutional rights. These five scholarly publications are: *Legal Aspects of Control of Student Activities by Public School Authorities*, by E. Edmund Reuther, Jr., *Rights and Freedoms of Public School Students: Directions from the 1960's*, *Legal Aspects of Crime, Investigation in the Public Schools* by William G. Buss, *Legal Aspects of Student Records* by Henry E. Butler, Jr. and *Suspension and Expulsion of Public School Students* by Robert E. Phay. Of these five publications *Rights and Freedoms of Public School Students: Directions from the 1960's* and *Suspension and Expulsions*...
sion of Public School Students are most important to this study for they examine legal trends in student rights and assess the status of those rights.

Numerous scholarly articles have appeared in the various law school journals in recent months on the subject of student constitutional rights. Many of these articles offer penetrating analysis of specific aspects involving student judicial controversies. Of particular importance to this work is Stephen R. Goldstein's "Reflections of Developing Trends in the Law of Student Rights,"11 "Developments in the Law--Academic Freedom,"12 "Due Process and Secondary School Dismissals"13 by C. Michael Abbott, and "With Temperate Rod: Maintaining Academic Order in Secondary Schools"14 by Arnold Taylor.

In a 1971 doctoral dissertation Academic Freedom in Historical Legal Context, Maurice M. Sullivan traced the development of academic freedom in the United States and concluded that the forces that characterize the larger society are the controlling factors that influence academic freedom in public

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education.

It appears that many more studies will be published in the coming months on student constitutional rights. These studies will all add to the growing body of literature on the topic of student constitutional rights, literature that is needed at a time when the number of student legal suits increases.
CHAPTER II

THE EXPANSION OF CONSTITUTIONAL RIGHTS THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Introduction

Our body of law is undergoing a continuous change. It undoubtedly reflects the social, economic, and political pressures of the time. This ability in our legal system to change does not infer instability, but, on the contrary enables the democratic process to survive through necessary adaptations—adaptations to the forces of change that have made the law more just.

The judicial system in the twentieth century, reacting to the forces of change, has expanded the scope of constitutional protection to citizens heretofore denied that protection. The major vehicle used to effect the expansion of justice has been a broader interpretation of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privilege or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

By insisting that the states were not allowed to deprive any person of life, liberty, or property without due process of law, the courts expanded the Bill of Rights to more citizens. In the late 1960's the broader interpretation of the Fourteenth Amendment began to be applied to public school pupils as well
as adults in court litigation. The result was that students began to gain a measure of constitutional protection while attending public schools. Thus, the study of student constitutional rights is a study in change, change that has seen the evolution of law leading to a more just society. Tracing the historical development of the due process clause as a vehicle that effected this change is important.

**Historical Background of the Fourteenth Amendment**

Arguments were offered at the constitutional convention to make all the rights found in the Bill of Rights applicable to the states. Advocates of this idea wanted to insure that the states, as well as the national government, would not encroach upon an individual's fundamental rights. However, the founding fathers rejected these suggestions because they felt that it was the prerogative of each individual state to determine what rights should be guaranteed to their respective citizens. The framers of the constitution concluded that to force a federal bill of rights upon state governments would violate the spirit of the newly established federal system of government. This point was emphasized by Hamilton as he wrote in the *Federalist*, "There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light--I mean the ordinary administration of criminal and civil justice."  

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Following Hamilton's advice, the Bill of Rights, when adopted by the convention, applied to the federal government.

The question of whether or not the Bill of Rights might inhibit actions by a state arose in the courts as early as 1833, in Barron v. Baltimore. The city of Baltimore by the paving of its streets diverted streams from their natural courses rendering Barron's wharf practically useless. Barron felt he was being deprived of his property by the city of Baltimore without due process of law. He insisted that the Fifth Amendment, which forbids taking private property for public use without just compensation, ought to be construed to restrain the states as well as the national government. In rejecting Barron's contention, Chief Justice Marshall pointed out that if the framers of the Bill of Rights had intended them to be incumbent upon the state governments, they would have expressed that intention.²

Prior to the Civil War citizens looked to the state constitutions for protection of individual rights and liberties. The national government was not expected to step in and protect citizens from state denials of civil rights. After the Civil War, however, the newly enfranchised freedmen needed national protection from state abuses. A direct result of this concern led to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

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² 7 Pet. 243 (1833)
The purposes of the Thirteenth Amendment, which abolished slavery and the Fifteenth Amendment, which granted Negroes the vote, were quite clear. What was meant by the Fourteenth Amendment, on the other hand, became subject to question. The task of interpreting the Fourteenth Amendment was up to the Supreme Court. For example the Supreme Court has had to struggle with such questions as: What are the privileges and immunities of citizens? What is meant by due process of law? Is due process concerned only with court procedures found in the Fifth Amendment? What does equal protection mean? Finally, the important question relevant to this study, does the Fourteenth Amendment extend part or all of the civil rights and liberties found in the Federal Bill Of Rights to the citizens of the various states against state encroachment? Because of these questions and many more, there have been more cases interpreting the Fourteenth Amendment than any other phase of Constitutional Law.  

In 1873, just five years after the Fourteenth Amendment was adopted, the Court rendered its first significant interpretation of the new amendment in the Slaughterhouse Cases. The case did not concern civil rights of personal liberties but rather dealt with the right of the State of Louisiana to grant a monopoly to a single company in the slaughterhouse business.

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Plaintiffs sought a declaration that Louisiana's action was unconstitutional on the grounds it violated the privileges and immunities of citizens of the United States. The resulting decision was quite significant. The court distinguished between state citizenship and national citizenship, and emphasized that the rights and privilege of federal citizenship did not include the protection of ordinary civil liberties such as freedom of speech, press, and religion. The issue of the dual system of governments was a primary consideration, for the Court pointed out, "...[T]hese consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character...." As a result, the states were to continue with the responsibility for the protection of their respective citizens' civil rights and liberties.

A second major interpretation of the Fourteenth Amendment came in the Civil Rights Cases of 1883. This time the issue was racial discrimination. Congress passed the Civil Rights Act of 1875 in the waning days of Reconstruction to insure continued federal protection of the Negro's civil rights.

4. Ibid.

5. Slaughterhouse Cases, 16 Wall. 36, 78 (1833)
The law made it a crime and a civil wrong for any person to deny anyone full and equal enjoyment of public accommodations. Much to the chagrin of the Negro community, the Supreme Court held the act unconstitutional. The language of the Fourteenth Amendment was followed explicitly. The Amendment states, "No State" shall deny equal protection of the laws or due process of the law. The Court distinguished between "no state" and "no person". Since the Amendment designated the state and not private persons, Congress, in passing laws to enforce the Amendment, could not make it a crime to do what the Amendment did not forbid. In the language of the Court: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." 6

Again, the concern of encroachment over state prerogatives under the federal system was evident in the Civil Rights Cases. The court makes this point by declaring the Civil Rights Act of 1875, "...[W]ould be to make Congress take the place of State Legislatures and supersede them." 7 Thus the Civil Rights Cases refused to expand the scope of the Fourteenth Amendment to protect civil liberties and, furthermore, prevented Congress from exercising control over acts of private

6. 109 U.S. 3, 10 (1883)
racial discrimination.8

A third significant pre-twentieth century case interpreting the Fourteenth Amendment, dealt squarely with the due process clause. In Hurtado v. California9 the defendant, Hurtado, was convicted of murder and sentenced to be hanged without first being indicted by a grand jury. California statutes did not require an indictment by a grand jury in all criminal cases. Hurtado claimed the state was depriving him of his life without due process of law. He pointed out that Article V of the United States Constitution requires indictment by a grand jury for federal crimes and the state should also be bound to the same as a matter of due process. Unfortunately for Hurtado, his contention was rejected and his conviction was sustained.

In this case, as in the two previous cases, the Supreme Court refused to interpret the Fourteenth Amendment in such a way as to usurp state legislative control over civil rights. In assuring California it could establish criminal procedures which differed from federal criminal procedures, the Court said, "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in further-

9. 110 U.S. 516 (1884)
10. Ibid., p.537.
ance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law...."  

Hurtado is similar to the earlier Barron decision because in each, the claimants sought to require due process in state actions. In both cases the Supreme Court refused to apply federal standards to state court procedures. The difference rests in the fact that Hurtado sought relief under the due process clause of the Fourteenth Amendment, which was not part of the constitution when Barron v. Baltimore was adjudicated.

In the decades following the Civil War the Fourteenth Amendment underwent a strange metamorphosis. Instead of protecting the civil rights of the Negro, as the amendment intended, the Fourteenth Amendment became a device for big business interests to thwart state legislative control over their activities. As the abuses of big business, particularly the railroad industry, became more flagrant, demands for reform were heard from an increasingly large number of discontented citizens. State legislators responded by enacting various laws regulating such things as rates and freight. Proponents of big business sought relief in federal courts asserting that the states, by regulating their activities, were depriving them of property without due process of law.

Prior to the ratification of the Fourteenth Amendment,

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11. Ibid.
the concept of due process of law was confined only to procedures used by the federal government in bringing an offender of the law to court. Pressure from vested interests upon the court to accept the theory that the substance of a law itself could be held void for want of due process of law began to increase in the last quarter of the Nineteenth Century. The court did depart from the strict interpretation of "procedural" due process as the only kind of due process of law. At first the majority of the Court was not in sympathy with business as they ruled in Munn v. Illinois that the only way relief could be sought from an unjust rate was to elect a new legislature to enact a just one.

During the next twenty years, however, the make-up of the court changed to members whose judicial philosophy supported the "substantive" due process idea. For example, the court abandoned the Munn doctrine and declared in Chicago, M. & St. P.R. Co. v. Minnesota, 1890, that the court could review acts of the legislature regulating rates in order to insure the requirement that due process of law would be met. There are literally hundreds of cases similar to this wherein the court expanded the breadth of the due process clause to include substantive as well as procedural due process. The concept of

12. Cushman and Cushman, p. 554.
13. 94 U.S. 113 (1877)
14. 134 U.S. 418 (1890)
substantive due process was to have significant implications for court rulings in the Twentieth Century. Cases arising out of the struggle for civil rights saw the Supreme Court apply the doctrine of substantive due process to individual rights and liberties.

In Maxwell v. Dow, Maxwell was convicted of murder by a jury of eight, which was legal under the state laws in Utah. His lawyers argued the state of Utah should be required to provide a jury of twelve as required by the Sixth Amendment. Also, the Court was further urged to apply federal standards found in all of the first ten amendments. The Court dealt with the issue squarely.

It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and therefore the states cannot provide for any procedure in state courts which could not be followed in a federal court because of the limitations contained in those amendments.16

The Court refused to broaden the scope of the Fourteenth Amendment. Rejecting Maxwell's plea they stated, "...When the Fourteenth Amendment prohibits the abridgment by the states of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it

15. 94 U.S. 113 (1900)
16. Ibid., p. 587.
covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers."\textsuperscript{17} Thus, it can be seen here as early as 1900 an attempt was made to have the rights in the Constitution apply to state actions. However, as seen, it was rejected by the Supreme Court.

The last landmark decision to be considered before turning to cases that gradually shifted the pendulum toward a broader interpretation of the due process clause of the Fourteenth Amendment is \textit{Twining v. New Jersey}, 1908. In \textit{Twining}, the court rejected the argument that the due process clause of the the Fourteenth Amendment was what Cushman and Cushman concluded a "shorthand for the first eight amendments."\textsuperscript{18} Twining, who after refusing to testify on his behalf, was subjected to some prejudicial remarks directed to the jury from the presiding judge, contended this violated his right to remain silent, a protection of the Fifth Amendment. The question the court had to consider was an important one. Do prejudicial remarks by a judge when a defendant refuses to testify constitute a denial of due process of law? The question was difficult because compulsory self-incrimination is considered particularly repugnant to our idea of what is just. In

\begin{itemize}
\item \textsuperscript{17} \textit{Ibid.}, pp. 595-596.
\item \textsuperscript{18} Cushman and Cushman, p. 604.
\end{itemize}
reaching the decision, the Court considered the historical implications of due process of law and its relationship with our judicial philosophy. The law of the land of Magna Carta had been interpreted to mean due process of law and the practice of compulsory self-incrimination was not regarded as part of due process of law. 19 Finally, the court in Twining went on to warn that the application of the due process of law test to ancient English common law would act like a "straightjacket" upon American jurisprudence to be unloosened only by constitutional amendment. 20 Incidentally, Justice Harlan dissented sharply from the court's holding that the protection against self-incrimination was not a "fundamental" right which is protected against abridgment by the due process clause of the Fourteenth Amendment.

The Growth of First Amendment Rights

By conceding the point that some "fundamental" rights might be protected by the due process clause, the Court had to face future cases in which "fundamental" rights were allegedly violated by the states. Thus, it became the task of future justices to determine what would be so "fundamental" that no government could violate it.

19. 211 U.S. 78 (1908)
20. Ibid.
The first major breakthrough in expanding the liberties in the Constitution to prevent encroachment by the states came in *Gitlow v. New York*, 1925.\(^{21}\) Benjamin Gitlow, a Socialist, had been convicted in New York under the Criminal Anarchy Act of 1902 for distributing a document, "The Left Wing Manifesto," which advocated the violent overthrow of the United States Government. Gitlow contended that the statute was repugnant to the due process clause of the Fourteenth Amendment. His position was summed up by the Court:

> The argument in support of this contention rests primarily upon the following propositions: first, that the 'liberty' protected by the Fourteenth Amendment includes the liberty of speech and of press; and second, that while liberty of expression 'is not absolute,' it may be 'restrained' only in circumstances where its exercise bears a casual relation with some substantive evil, consummated, attempted, or likely; and as the statute 'takes no account of circumstances,' it unduly restrains this liberty, and is therefore unconstitutional.\(^{22}\)

The Court rejected Gitlow's argument, because in 1925 it was felt that advocating the overthrow of organized government by force could not be allowed. The Court said, "That a state, in the exercise of its police power may punish those who abuse this freedom by utterance inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question... [however for] more imperative reasons, a state may punish utterances

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21. 45 S. Ct. 625 (1925)

endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state." Even though Gitlow's appeal was adjudicated against him, the importance of this case for the study undertaken here is the position taken by the Court on fundamental personal rights. It was stated in Gitlow, "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states...." From this beginning the door was opened for future interpretations expanding further the Bill of Rights to all. After 1925 state statutes restricting freedom of speech and press could be reviewed by the Supreme Court. Federal standards of speech and press would thus be applied to the states. Federal protection of civil rights and liberties had begun.

Near v. Minnesota, the next case to be considered here, represents the climax of the evolution in constitutional law whereby freedom of speech and press are at last "nationalized," Thereafter, federal constitutional standards governing free speech and press would apply to the states. Near had been

23. Ibid., p.630.
24. Ibid.
publishing a weekly exposé on the scandalous behavior of public officials during the prohibition era. A Minnesota statute now known as the "Minnesota gag law", provided for the "pad-locking, by injunctive process, of a newspaper for printing matter which was scandalous, malicious, defamatory, or obscene". The injunction could be lifted if the publisher could prove in court none of these conditions existed. This process, in the view of the Supreme Court, amounted to prior censorship and violated a long-established canon of free speech and press. The majority of the Court felt, "... That liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although exclusively, immunity from previous restraints of censorship." What is even more important to note in this study of the due process clause of the Fourteenth Amendment, is the precise statement regarding its position on speech and press. To quote the Court. "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." This case will also be reviewed in a later section on "A Student's Right to a Free

25. 51 S. Ct. 625 (1931)
26. Ibid., p. 631.
27. Ibid., p. 628.
Press", for Near v. Minnesota also defines important boundaries for the responsible press to follow.

The other liberties mentioned in the First Amendment quickly became incorporated under federal judicial scrutiny and discipline. In Hamilton v. Board of Regents of the University of California, 1934, freedom of religion was held to be protected by the Fourteenth Amendment, although the Supreme Court held that the plaintiff's religious liberty was not abridged by compulsory military drill as a condition of attending the state university. Freedom of assembly became effectively "nationalized" in DeJonge v. Oregon, 1937. DeJonge, a Communist, had been convicted by an Oregon statute that prohibited members of the Communist Party from assembling for any reason. The Court in reaffirming its decision in Near, went on to include peaceful assembly as a fundamental right no government may encroach upon only in rare and exceptional circumstances. Again, the vehicle used to extend this right to all was the due process clause of the Fourteenth Amendment. Freedom of speech and of the press, the Court declared, "...[A]re fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal

28. 293 U.S. 245 (1934)
29. Ibid.
30. 299 U.S. 353 (1937)
Constitution..."^31

Cushman and Cushman accurately assess the judicial position after DeJonge. The Court in case after case had been classifying the provisions of the Bill of Rights into those which are fundamental freedoms binding the states through the operation of the Fourteenth Amendment and those which are not essential to due process and not binding upon the states. In effect, the Court had established what Cushman and Cushman perceive as an "honor roll" of superior rights which would bind both the state and national governments.^32 Under these circumstances the Court could pick and choose what it wanted to "incorporate"—what provisions found in the Bill of Rights they wanted applied to the states.

By 1947, Justice Hugo Black of the Supreme Court was calling for a total incorporation of the first eight amendments. In a vigorous dissent, in Adamson v. California, 1947, Justice Black stated his position. He wrote, "...[The] Court concludes that although comment upon testimony in a federal court would violate the Fifth Amendment, identical comment in a state court does not violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the federal constitution as amended."^33 Black, the Court's strong-

^31. Ibid., p.364.
^32. Cushman and Cushman, p. 592.
^33. 332 U.S. 46, 69 (1947)
est proponent of the incorporation theory until his recent death, could not reconcile himself to a double standard for state and national governments where civil rights and liberties were under attack. He sought to support his position by historical analysis. Black continued in *Adamson*,

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states. 34

Black concluded his dissent by flatly stating that, "... I believe [it] was the original purpose of the Fourteenth Amendment to extend to all people of the nation the complete Bill of Rights." 35

Black's position was challenged in a scholarly article by Professor Charles Fairman in the *Stanford Law Review*. Professor Fairman noted first the strange course of evolution the Fourteenth Amendment had taken in constitutional law since its ratification.

No one*, he stated, "could foresee that Section 2 would prove abortive—that the most interesting feature of Section 1, the privileges and immunities clause, would be virtually read out of the Constitution in 1873 *Slaughterhouse Cases*—that the due

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34. Ibid., p. 71.

35. Ibid., p. 89.
process clause would become, from the point of view of litigation, one of the two most important clauses in the entire Constitution—or that it would be the judiciary, not the congress, that most concerned itself with the protection of life, liberty, and property. 36

In his article, he examined at length 1868 congressional committee hearings, congressional debates, state legislatures' debates and public reactions to the amendment via newspapers and concludes, "Certainly that evidence, fairly presented, counts heavily against the theory of incorporation." 37 He continued, "If it was understood in the legislatures that considered the proposed amendment, that its adoption would impose upon the state governments the provisions of the federal Bill of Rights, then almost certainly each legislature would take note of what the effect would be upon the constitutional law and practice of its own state." 38 Fairman alludes to the point that "incorporation", or forcing the states to abide by federal standards spelled out in the Bill of Rights, would certainly have been rejected by the states, especially Amendment VII which requires jury trial in suits at common law exceeding twenty dollars.

A survey of debates where states considered the proposed Fourteenth Amendment centered around ratification and not in-


37. Ibid., p. 81.

38. Ibid., p. 82.
corporation. Professor Fairman concluded his lengthy article by asserting, "In his [Black's] contention that Section I was intended and understood to impose Amendment I to VIII upon the states, the record of history is overwhelmingly against him." Black retorted that as a United States Senator, he could better interpret what really was meant in the congressional committee hearings and debates.

The Warren Court

The movement for racial equality in the 1950's provided the force that made the judiciary see the importance of extending the scope of constitutional protection to all.

The Supreme Court, under the leadership of Chief Justice Warren, quickly made its position on civil rights known to the country in the famous 1954 Brown decision. Bernard Schwartz assessed the impact of Brown on society as equal only to a political revolution or a military conflict. Cushman and Cushman stated of Brown, "It is doubtful if the Supreme Court in its entire history has rendered a decision of greater

39. Ibid., p. 83.
40. Ibid., p. 139.
social and ideological significance than this." With a sweeping decree, the Court held invalid the "separate but equal" doctrine which had legalized racial discrimination for over fifty years. Where the executive and legislative branches had failed to act, the Court thrust itself into the forefront as the guardian and perpetrator of egalitarianism. The "equal protection clause" of the Fourteenth Amendment was the constitutional vehicle used to deliver this historic judgement, not the due process clause. Chief Justice Warren in rendering the unanimous decision declared,

We conclude that in the field of education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. Even though the due process clause was not an issue, Brown is mentioned because it was a result of the strongest force in current constitutional development, the demand for racial justice. This force has also extended the idea of

43. Cushman and Cushman, p. 793.
egalitarianism to cover a state's basic obligations to its citizens. As a result, the Court has concerned itself with the protection of personal liberties and privacy against government intrusions as well as significant reforms in criminal procedures for federal and state courts. Thus, a vigorous period of judicial activism, revived after a period of twenty years, had begun in 1953. The Warren Court, its defenders say, spearheaded progress in civil rights, administration of criminal justice, protection of individual liberty and strengthened and extended political democracy. By the time Chief Justice Warren retired from the highest bench sixteen years later, the due process clause of the Fourteenth Amendment had been held to incorporate virtually all of the Bill of Rights. The final say in civil liberties had been effectively transferred to the federal court system thereby causing a basic institutional change—the expansion of federal judicial power at the expense of the states.

The Warren Court was, of course, not without critics. The members of the highest court have been criticized for erratic subjectivity of judgment, analytical laxity, intellectual incoherence, and imagining too much history. Opponents of the Warren Court assert that the failure of society to abide by the school desegregation decree of 1954 is an example

46. Ibid., p.4
where judicial supremacy can not work in broad areas of social policy. For the purpose of this study of students' constitutional rights, in spite of the criticism, the Warren Court is most significant. It was this court's determination to expand the concept of egalitarianism which ultimately came to include school students as well as other members of society. It was also this court that made the individual liberties found in the Bill of Rights a reality for all citizens.

By 1960, The Supreme Court had a majority of members who either believed in the "selective incorporation" theory or who would vote with the theory's proponents in cases involving civil liberties. As a result, in decision after decision, the Court made various aspects of the Bill of Rights applicable to the States. The most important decisions are reviewed here in chronological order.

The Expansion of Constitutional Rights in the 1960's

In 1961 Mapp v. Ohio the Court held that evidence seized in an illegal search could not be admissible in state court proceedings. The State of Ohio had convicted Mrs. Mapp for knowingly having had in her possession lewd and lascivious


books, pictures, and photographs. Police officers had ostensibly been seeking a person in connection with a recent bombing when they forcefully entered Mrs. Mapp's home without a search warrant. During the course of the search, pornographic material was seized and used as evidence to convict the defendant. The Supreme Court frowned upon such action by the saying, "... [A]s to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy...do enjoy an 'intimate relation' in their perpetuation of principles of humanity and civil liberty...."49 The Court went on to say:

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior case, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforcible prohibitions of the same Amendments. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.50

The problem of the double standard in criminal justice recognized by the Court was to be solved by applying federal standards to the states. It is worth examining further the Court's reasoning in Mapp. "Federal state cooperation in the solution of crime under constitutional standards will be promoted, if

49. Ibid., p.657.

50. Ibid.
only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches." \[51\] Here, the Court is convinced, in the essence of justice, all law enforcement agencies should be bound to the same standards. Finally, the importance of due process is stressed. "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforcible against the States... it becomes enforcible in the same manner and to like effect as other basic rights secured by the Due Process Clause." \[52\]

Gideon v. Wainwright \[53\] in 1963 dealt with the conviction of a Florida indigent who was denied counsel by the state. Florida statutes provided for a state-appointed attorney only in capital offenses. Gideon, defending himself as best he could, was convicted of a crime. Justice Black, the most vigorous proponent of the "total incorporation" theory, delivered the opinion in Gideon. He said, "...[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too

\[51\] Ibid., p. 658.

\[52\] Ibid., p. 660.

\[53\] 372 U.S. 335 (1963)
poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth."\(^54\)

Rights and liberties considered by the Court to be fundamental would be protected by due process as they were outlined earlier in *Palko v. Connecticut*\(^55\) the Court reasoned in *Gideon*. Using the *Palko* formula, the Court determined the right of counsel was deemed "fundamental" and therefore guaranteed to all citizens as a matter of due process of law. The Court confirmed its belief by saying, "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.\(^56\) Thereafter, the right of counsel became a protected right of all citizens prescribed in Article VI of the United States Constitution.

In *Malloy v. Hogan*\(^57\) the Supreme Court incorporated the self incrimination section of the Fifth Amendment through the due process clause of the Fourteenth Amendment. The petitioner had refused to testify in a Connecticut investigation into alleged gambling activities for fear of self-incrimination.

\(^{54}\) Ibid., p. 344.

\(^{55}\) 302 U.S. 319 (1937)

\(^{56}\) *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

\(^{57}\) 378 U.S. 1 (1964)
For his refusal he was sent to jail. Justice Brennan in delivering the opinion of the Court, applied the Fifth Amendment to cover state proceedings. He said, "We hold that the Fourteenth Amendment privilege against self-incrimination, and that under the applicable federal standard, the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked."\(^{58}\)

The number of rights found in the Constitution continued to be nationalized as the decade progressed. Nineteen sixty-five saw the incorporation of the Sixth Amendment which allows the accused to be confronted with the witnesses against him. Pointer was arrested on a charge of robbery in Texas. Before the trial took place the only witness against him moved and a transcript of the account was submitted in lieu of a personal appearance. Pointer claimed he was being denied the right to confront a witness against him.\(^{59}\) The Court agreed and speaking through Justice Black again, stated: "We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the states by the Fourteenth Amendment."\(^{60}\) The Court went further in its reasoning, "The fact that this right appears in the Sixth Amendment of our Bill of Rights re-

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58. Ibid., p. 3.
60. Ibid., p. 403.
fects the belief of the framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.\footnote{61} Here Justice Black indicates the framers had intended this Sixth Amendment right to be enjoyed by all. As earlier noted, this point is historically debatable, nevertheless, federal standards in the Sixth Amendment became applicable to the states through the due process clause of the Fourteenth Amendment.

Another landmark decision in 1965 was \textit{Griswold v. Connecticut}.\footnote{62} The case was taken on appeal from the Supreme Court of Errors of Connecticut over the conviction of the Executive Director of the Planned Parenthood League of Connecticut for promoting birth control in Connecticut.

The General Statutes of Connecticut, 53-32 and 54-96 stated:

\begin{quote}
Any person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.
Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.
\end{quote}

In overturning the conviction and declaring the Connecticut statutes unconstitutional on the grounds it violated the First Amendment to the Constitution, the Supreme Court estab-

\footnote{61. \textit{Ibid.}, p. 404.}
\footnote{62. 381 U.S. 479 (1965)}
lished the concept that, "The First Amendment has a penumbra where privacy is protected from governmental intrusion." The "penumbra doctrine" creates various zones of privacy around the right of association. Webster defines the word penumbra as "a surrounding or adjoining region in which something exists in a lesser degree." Griswold contends that the right of association, although not mentioned in the First Amendment, is a First Amendment right. Speaking for the Supreme Court, Justice Douglas delivered the opinion stating:

The right of 'association' like the right of belief [Board of Education v. Barnette, 319 U.S. 624] is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion: and while it is not expressly included in the First Amendment its existence is necessary.

The Supreme Court, in fact, made privacy a "fundamental" right protected by the United States Constitution. The Court in Griswold further elaborated upon the zones of privacy created by the "penumbra doctrine" in respect to other constitutional rights of citizens.

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet

63. Ibid., p.483.
64. Ibid.
of that privacy. The Fourth Amendment explicitly affirms the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searchers and seizures. The Fifth privacy which government may not force him to surrender. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. 65

Two years later in 1967, a North Carolina legal procedure brought a challenge to another Sixth Amendment right, that of a speedy trial. In the resulting case, Klopfer v. North Carolina, 66 the court held unconstitutional a state procedure known as nolle prosequi, which allowed a prosecutor to discharge a defendant and at some future day to be determined by him, restore the case to the court docket. Klopfer, a zoology professor at Duke University had refused to leave a restaurant when ordered. A trespassing charge resulted. Instead of being tried, Klopfer's case was postponed for eighteen months under nolle prosequi. He tried to bring his case to court but to no avail. The charges against him restricted his travel and professional activities to the point of being burdensome. Klopfer sought relief claiming that nolle prosequi denied him his constitutional right to a speedy trial.

The Supreme Court agreed, declaring that, "We hold here that the right to a speedy trial is as fundamental as any of

65. Ibid.

66. 386 U.S. 213 (1967)
the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. The Court concluded that, "History has established that it is one of the most basic rights preserved by our Constitution." In concurring in the Klopfer case, Justice Harlan reminded the court, "I am unable to subscribe to the constitutional premises upon which that result is based—quite evidently the viewpoint that the Fourteenth Amendment "incorporates" or "absorbs" as such all or some of the specific provisions of the Bill of Rights." He also went on to say that, "I do not believe that this is sound constitutional doctrine." Even though Justice Harlan was against the "incorporation" theory, his concurrence in the decision helped make it a reality in constitutional law. Incorporation of the Bill of Rights advocated by Justice Black twenty years earlier in Adamson was being accomplished on a case by case basis.

In Duncan v. Louisiana, the Supreme Court reviewed its previous decisions that had dramatically increased the scope of an individual's rights and liberties.

67. Ibid., p. 223.
68. Ibid.
69. Ibid., p. 226.
70. Ibid.
71. Ibid.
72. 391 U.S. 145 (1968)
The Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the rights to compensation for property taken by the State; the rights of free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.73

Duncan expanded the scope of nationalization of the Bill of Rights by including the right to a jury trial. Duncan, a black youth of nineteen, was found guilty of simple battery and sentenced to serve sixty days in prison and was fined $150.74 He was denied a jury trial in the State of Louisiana wherein statutes provided for a jury trial only in capital offenses or where imprisonment at hard labor could result. The Court overturned Duncan's conviction stating, "...because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which--were they to be tried in a federal court would come within the Sixth Amendment's guarantee."75

73. Ibid., p. 148.

74. Witnesses testified that Duncan, a Negro, and his two cousins, during a confrontation with four white youths, allegedly slapped one of the white boys on the elbow which resulted in his sentence by a Louisiana judge.

75. Duncan v. Louisiana, 391 U.S. 145, 149 (1968)
Summary

The Supreme Court in the Twentieth Century gradually expanded the Bill of Rights to cover actions by the states. This has been accomplished through a broader interpretation of the due process clause of the Fourteenth Amendment. Whether or not the framers of the Amendment intended it to be expanded to "incorporate" the Bill of Rights is an academic argument since that is what has occurred. The Warren Court in particular made many of the federal standards found in the Bill of Rights applicable to the states in criminal proceedings.

The reason that the Bill of Rights has been expanded to cover state actions is because the Supreme Court has interpreted various cases in such a way to guarantee all citizens fundamental fairness and due process of law. The insistence by the Supreme Court that all individuals, non-adult as well as adult, be accorded due process of law has led to the growth of constitutional rights for public school pupils, the subject of Chapter Three.
Until quite recently discretion over pupil control was very broad. Questions were raised by courts only where a board's discretion did not meet the test of reasonableness. The reasonableness of a rule was determined by the facts in each case and the courts traditionally were reluctant to substitute their wisdom for a school board's. Furthermore, the courts never explored to see if the particular rule in question performed a proper educational function. Finally, judges tended to agree with the view of most school boards that a definite threat to the educational process existed if all their rules were not upheld. ¹

However, with the growth and expansion of due process the courts today are increasingly called upon to act as arbiters of disputes between students and school administrators. The insistence by the courts that students should be accorded a measure of due process in their relationships with schools has provided the legal framework for judicial involvement in these disputes. In addition, social forces acting upon the schools have also contributed immensely to this increased in-

¹ Leonard v. School Committee of Attleboro, 212 N.E. 2d 468 (1965)
Schools by and large have traditionally derived their authority to administer control over students from a number of sources. Of primary importance is the very fact that parents of school pupils have quite willingly sanctioned school control over their children while in school. Equally important has been the fact that the pupils themselves have acquiesced to the authority over them in the educational institutions they attend. Furthermore, a school, as an agent of the state, is backed by a legislative mandate. To put it quite succinctly, "A state school is an arm of the state, performing a public function, exercising discretion committed to it by the legislature, and regulating citizens affected by its activities by means of combined governmental functions." Legislative enactments as a source of school authority can best be seen through a typical school board enabling act.

The board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules.


4. Iowa Code 279.8 (1966)
Still another source of school authority is the accepted status of the teacher acting in a quasi-judicial capacity to control students and to administer punishment in the maintenance of order. Students who violate school rules have been subjected to immediate punishment as proscribed by the teachers. Finally, one of the most important sources of school board authority has arisen out of the concept of \textit{in loco parentis}. Briefly, \textit{in loco parentis} is an extension of the idea of the state as \textit{parens patriae}—the state succeeding to the duties of the parent whenever the later is unable to attend to them.\(^5\)

The courts obviously have had to modify and revise this concept over the years. For example, schools can not render medical assistance or teach religion to public school pupils. Recently in the area of control of pupils, \textit{in loco parentis} has been challenged with increased vigor by dissatisfied students. The basic problem of the concept centers around the technical difficulties created by judicial interpretations of the definition and the conflict between parents and teachers over disciplinary approaches of teachers.\(^6\) To put it more bluntly, \textit{in loco parentis} breaks down when pupils violate school rules with parental permission. The "long hair" con-

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troversy in the public schools is a case in point. Backed by parents, students challenging in loco parentis in court, point out that by requiring short hair in school, long hair can not be worn once the student is again under the custody of the parent. Thus, in loco parentis is seen more and more as a means to control pupil behavior merely for control's sake. In loco parentis is being replaced by a more fundamental concept, that of due process of law.

Today rules and regulations promulgated by schools for controlling pupils are being judged by the courts on the grounds of fundamental fairness. Since due process guarantees protection of the individual from governmental intrusion, then it also would hold that the same constitutional concept protects the individual from the state's agents, the school and its personnel. 7

The change from the traditional sources of school authority over pupils to the emerging concept of due process is a complex one requiring an examination of the forces that have influenced this change. There is a strong strain of autocracy in the American public schools attributable to two factors. 8


First, there is the tradition of autocratic treatment of students arising from New England Puritanism. Such ideas as blind obedience to one's elders, a "middle-class" idealism that inhibits nonconformity, and discipline for discipline's sake, stems directly from the Protestant Ethic. Near absolute authority in the public schools was therefore necessary to instil these ideals. Secondly, there is a natural tendency of school officials to dominate those over whose admission to the school they have no say but for whose behavior they are held responsible. Control for the maintenance of order became deeply ingrained in educational administration.

Public school students now challenge the authoritarian structure of educational institutions for a number of reasons. In the broadest sense, resistance to school authority comes from "Man's inner drive to achieve full recognition of his rights and freedoms." The United States Office of Education reports the major issues of student concern are: 1. Dehumanization of institutional life. 2. Inequities in society. 3. Educational irrelevancies. 4. Racial and cultural discrimination. Because of student concern for these issues, violence has sometimes erupted in and around educational institutions.


The threat of disruptions and violence has prompted many educators to view the necessity for maintaining their authority to control pupils more essential than ever.

A number of basic incidents leading to disruption of the educational process have been identified and categorized as the following: a. Violence arising out of racial conflicts. b. Disruptions following political protests. c. Resentment over dress regulations. d. Objections by students to disciplinary actions toward other students. e. Questioning of educational policy.11

Others point out that educational violence is caused more specifically in the public schools from:

1. A permissive society in which persons adopt the attitude that they will obey those laws they like and ignore those they do not like.

2. Substandard schools, oftentimes in the very areas where the best teachers and facilities are needed.

3. Untrained and unqualified administrators who are unable to cope with such subjects as mob psychology and guerrilla tactics.

4. Highly educated teenagers with time on their hands and a high degree of social consciousness and impatience with the slow progress in solving problems.

11. Ibid.
5. Professional trouble-makers who create disruptions.

6. Increasingly militant teachers who side with students.¹²

School officials who have sought to stand by the traditional attitudes toward control over students have thus found themselves involved in an increasing number of legal controversies. Courts today, particularly the federal courts, now are willing to intervene to reverse or enjoin disciplinary actions involving public school pupils where one of the following conditions exist. First, if there is a deprival of due process, that is, fundamental concepts of fair play. Secondly, if there is evidence of invidious discrimination, for example on account of race or religion. Thirdly, if there exists a denial of federal rights, constitutional or statutory, protected in the academic community. Finally, if the schools exhibit clearly unreasonable, arbitrary, or capricious action.¹³

Because of the courts' willingness to intervene in areas heretofore reserved to the discretion of school officials, a new body of constitutional law has emerged from their subsequent decisions--the law of student constitutional rights, which is a study in the expansion of the concept due process to include public school pupils. Through the Supreme Court's determination to expand the scope of constitutional protection to all, public school pupils inevitably became recipients of that

¹² Gaddy, p. 2.

protection. Legal scholars now assert that, "We are beyond the point of no return in guaranteeing the applicability of the Fourteenth Amendment and the Bill of Rights to all, regardless of age or status."¹⁴

The vehicle used to expand constitutional protection to public school pupils, as well as to a greater number of citizens in our society, has been the due process clause of the Fourteenth Amendment as seen in Chapter Two. Robert E. Phay in his work Suspension and Expulsion of Public School Students suggests that, "The main assault against school limitations is application of the due process clause of the Fourteenth Amendment."¹⁵ The study of this new incoherent body of constitutional law is a study of the process of replacing the archaic ideas of school authority, especially in loco parentis, with the emerging concept of due process of law. The process by which this has come about can be perceived through a case study of the major decisions affecting the law of students' rights.

Past Judicial Attitude Toward Student Suits

Until recently public school pupils seeking judicial relief from school abuses had little or no chance of successful litigation. The legal status of student suits that challenged

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¹⁵. Phay, p. 4.
rules, regulations, and administrative procedures was best summed up by Lee O. Garber and Newton Edwards in the Law Governing Pupils. The authors point out, "It is well established by many court decisions that school boards have authority to make and enforce any reasonable rules governing the conduct of pupils. The reasonableness of a board rule will be determined by the facts in each particular case. In determining the reasonableness of a rule, a court will not substitute its own discretion for that of the board; the enforcement of the rule will not be enjoined unless the rule is clearly unreasonable." The authors also stated that, "A board of education may discipline a pupil for misbehavior wherever committed provided it directly affects school discipline and is calculated to impair its efficiency." Finally, in respect to any rights the students might have, "Unless the statute requires it, it is not necessary to give the pupil notice of his suspension or a hearing before excluding him from school."

The extent to which school rules were upheld by the courts can be seen in Pugsley v. Sellmeyer. Miss Pugsley, an 18


17. Ibid., p. 8.

18. Ibid., p. 9.

19. 250 S.W. 539 (1923)
year old high school student, was suspended from school because she wore talcum powder on her face. Citing the school board rule, "The wearing of transparent hosiery, low-necked dresses or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited," the principal refused to readmit Miss Pugsley until she removed the powder. A lower Arkansas Court held the particular school rule unreasonable and arbitrary. However, upon appeal to the Arkansas Supreme Court, the lower court's decision was overturned.

The higher court refused to consider the substance of the school rule or whether it performed any educational function. Instead, the Court decided, "The question, therefore, is not whether we approve this rule as one we would have made as directors of the district, nor are we required to find whether it was essential to the maintenance of discipline. On the contrary, we must uphold the rule unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is, of promoting discipline in the school, and we do so find." 20

Two key points are important in considering the Court's reasoning in this case. First, the interpretation of what determines a clear abuse of discretion by the court indicates

20. Ibid., p. 539.
they would frown upon only major acts of unreasonable, arbitrary and capricious rule making. Secondly, and equally important, is the Court's view that any rules promoting discipline within the school should be upheld by the courts. Obviously, almost any rule can be justified by school officials on the grounds it promotes discipline, for most likely that would be its original intent anyway. These points are significant in reviewing subsequent cases.

The Pugsley decision went further in explaining the judicial philosophy at the time by pointing out that, "Courts have other and more important functions to perform than that of hearing the complaints of disaffected pupils of the public schools against rules and regulations promulgated by the school boards for the government of the schools."\(^21\) The judiciary's reluctance to usurp the prerogatives of school officials is most evident as they concluded "...that the courts hesitate to substitute their will and judgment for that of the school boards' which are delegated by law as the agencies to prescribe rules for the government of the public schools of the state, which are supported at the public expense."\(^22\)

As late as 1965, the judicial position on school rules and regulations remained basically consistent with previous de-

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21. Ibid.
22. Ibid.
cisions. In Leonard v. School Committee of Attleboro,\textsuperscript{23} the Supreme Judicial Court of Massachusetts refused to consider the validity of a school committee rule requiring male students to wear short haircuts. The plaintiff contended such a rule was unreasonable and arbitrary since it was in no way connected with the successful operation of a public school. The Court rejected this notion stating, "The Court's function in reviewing this type of ruling is limited in the light of the broad discretionary powers which the law confers upon a school committee. We will not pass upon the wisdom or desirability of a school regulation."\textsuperscript{24} The Court went on to suggest that any unusual hair style could disrupt and impede the maintenance of a proper classroom atmosphere or decorum and conspicuous departures from generally accepted customs in the matter of haircuts could result in the distraction of other pupils.\textsuperscript{25}

This mode of judicial philosophy mentioned earlier by Garber and Edwards began to change by the middle nineteen-sixties. At this time forces undermining this philosophy became so pervasive the courts were compelled to examine school rules from a substantive point of view. As a result of judicial intervention, rules, regulations and decisions slowly became to require the rudimentary elements of fair play--that

\begin{itemize}
\item \textsuperscript{23} 212 N.E. 2d 468 (1965)
\item \textsuperscript{24} \textit{Ibid.}, p. 472.
\item \textsuperscript{25} \textit{Ibid.}
\end{itemize}
of due process of law. As seen in Chapter II of this study, the expansion of the concept of due process of law which incorporated the Bill of Rights to prevent state governmental intrusion on these rights was a slow, step by step process. Citizens heretofore denied basic constitutional protection gradually gained the fuller protection of the United States Constitution. The process by which public school pupils also have gained a measure of constitutional guarantees through the idea of due process is closely analogous to the broader expansion of due process to all. The Courts gradually recognized the need for school rules to possess the fundamentals of fair play, of due process of law. It was accomplished by using the due process clause of the Fourteenth Amendment as a vehicle to broaden the scope of constitutional protection to include public school pupils. This process can best be seen by examining the most significant court decisions involving student legal controversies in chronological order.

Landmark Student Suits 1923-1961

Meyer v. State of Nebraska decided in 1923, has significance for study because the Supreme Court in this decision struck down a state statute forbidding the teaching of a foreign language to children below the ninth grade, on the grounds it deprived citizens of their "liberty" without due process of law found in the Fourteenth Amendment. When a teacher was

26. 43 S. Ct. 625 (1923)
prosecuted for teaching German in the eighth grade and the Nebraska's Supreme Court ruled the statute a valid exercise of the state's police powers, the teacher appealed to the Supreme Court of the United States for relief. In declaring the Nebraska law unconstitutional, the Supreme Court summed up its reasoning by stating, "We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state."27 This type of thinking, however, was not applied to lesser policies and rules made by agents of the state, the school boards.

Another important school case came to the Supreme Court in *Barnette v. West Virginia State Board of Education*, 1942. The *Barnette* decision struck down a West Virginia statute requiring all public school pupils to salute the American flag. Children who were Jehovah's Witnesses refused to salute the flag in accordance with their religious beliefs and were expelled from school. Seeking readmission, the plaintiffs contended, "...[T]hat the regulation amounted to a denial of religious liberty and was violative of rights which the First Amendment to the Federal Constitution protects against impairment by the federal government and which the Fourteenth Amendment protects against impairment by the States."28 The Court agreed with the students reasoning, "To justify the overriding

27. Ibid., p. 628.
28. 319 U.S. 624 (1943)
of religious scruples, however, there must be a clear justification therefore in the necessities of national or community life. Like the right of free speech, it is not to be overborne by the police power, unless its exercise presents a clear and present danger to the community."  

The Court went on,

The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it is petty tyranny unworthy of the spirit of this Republic and forbidden, we think by the fundamental law. This Court will not countenance such tyranny but will use the power at its command to see that rights guaranteed by the fundamental law are respected.  

This case is clearly the first major victory for students' constitutional rights. Also, the vehicle used to extend the constitutional right of freedom of religion found in the First Amendment to public school pupils was the due process clause of the Fourteenth Amendment. However, Barnette did not have a significant impact on broader aspects of students' constitutional rights because the case was limited only to the issue of religion.

The landmark Brown decision has had a tremendous impact on the constitutional rights of public school pupils even though the due process clause of the Fourteenth Amendment was not used in the ruling. Instead, the Supreme Court applied

29. Ibid., p. 626.

30. Ibid., p. 630.

the equal protection of the laws clause found in the Fourteen-
the Amendment to the Constitution to declare racial discrimina-
tion unconstitutional. What is significant, with respect to
the subject of students' rights, is the overwhelming emphasis
placed by the Court on education. Chief Justice Warren,
speaking for the Court, asserted,

Today, education is perhaps the most important func-
tion of the state and local governments. Compulsory
school attendance laws and the great expenditures
for education both demonstrate our recognition of
the importance of education to our democratic so-
ciety. It is required in the performance of our
most basic public responsibilities, even service in
the armed forces. It is the very foundation of
good citizenship. Today it is a principal instrument
in awakening the child to cultural values, in prepar-
ing him for later professional training, and helping
him to adjust normally to his environment. In these
days, it is doubtful that any child may reasonably
be expected to succeed in life if he is denied the
opportunity of an education. 32

Courts considering subsequent cases in the field of education
now have a precedent for viewing them in a more important light.
Anything thereafter, that might ider or deny a child the op-
portunity to an education, would be a serious question before
the courts.

Bolling v. Sharpe, 1954, decided on the same day as Brown
provides insight into the Supreme Court's rationale for later
expanding the due process of law concept to the field of pub-
lic education. The essential facts in Bolling centered around
the refusal of school officials to allow Negro children admit-

32. Ibid., p. 493.
tance to a white segregated school in the District of Columbia. Since federal laws apply in the District of Columbia, the plaintiffs contended their Fifth Amendment rights of life, liberty and property were being denied without due process of law. The plaintiffs in Brown, as mentioned, were successful in their litigation through the equal protection clause of the Fourteenth Amendment. Since there is no equal protection of the laws clause in the Fifth Amendment and the District of Columbia was under federal jurisdiction, relief was sought through the due process clause of the Fifth Amendment. The Supreme Court, noting the difference between Brown and Bolling, considered the issue.

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the state. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. The Court in Bolling, thus, went on to declare school segregation unconstitutional in the District of Columbia because it denied the students attending racially segregated schools due process of law.

33. 347 U.S. 497 (1954)

34. Ibid., p. 499.
Of particular importance to the concept of student constitutional rights was the declaration that, "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process." The Supreme Court made this declaration in a 1958 desegregation controversy involving Little Rock, Arkansas. By stating that segregation in a public school was a denial of a "fundamental" right, the Supreme Court established a precedent where alleged violations of any "fundamental" right might be taken to court.

The Brown, Bolling, and Cooper decisions involved racial segregation and discrimination and paved the way for a host of suits where racial questions were raised. Racial questions have centered essentially around the equal protection clause of the Fourteenth Amendment, not the topic of this study. However, these three decisions did provide a broad judicial framework for student suits to be considered under the due process clause of the Fourteenth Amendment. Brown emphasized the importance of education for all, Bolling applied the concept of due process of law in the public schools, and Cooper declared segregation to be a violation of a fundamental right. All, as mentioned, helped significantly to open the doors to litigation of "fundamental" rights that might be denied to students as a matter of due process of law.

35. Cooper v. Aaron, 358 U.S. 1, 19 (1958)
The Courts came to grips with the question of due process regarding college student disciplinary action in 1961, with *Dixon v. Alabama State Board of Education*. 36 Six Negroes who were involved in repeated civil rights demonstrations in Alabama, were expelled from the State University without formal charges or the chance to have a hearing. *Dixon*, considered by many legal scholars as a major landmark decision paving the way for students' constitutional rights, established the precedent that the fundamental right of procedural due process found in the Fifth Amendment should be afforded college students in tax-supported institutions prior to expulsion for misconduct.

Deciding in favor of the six civil rightists, the Sixth Circuit Court of Appeals emphasized the importance of due process of law, "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." 37 The Court reminded the school officials by not giving the accused students notice of the charges against them or the opportunity to be heard, violated one of our "fundamental principles of fairness." 38 They made the distinction between student disciplinary problems and criminal due process by pointing out that, "This is not to im-

36. 294 F. 2d 150 (1961)
37. Ibid., p. 155.
38. Ibid., p. 157.
ply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."³⁹ Finally, Dixon spelled out specific requirements that would meet the test of procedural due process in future disciplinary actions against college students. These requirements set forth by the Court will be examined later in this study.

As students began to raise constitutional issues before the courts in the nineteen-sixties, the problem of jurisdiction became increasingly difficult. Traditionally, a federal court would accept jurisdiction in student disputes only where a constitutional issue was at hand or judicial relief had been exhausted in state courts. Once the Supreme Court expanded the scope of "fundamental freedoms" through the Fourteenth Amendment, the federal courts were forced to accept controversies where constitutional rights were being denied by state action.

Landmark Student Suits 1961-1969

The most significant cases thus far to be considered in this study paving the way for public school pupils' constitutional rights were decided by the Fifth Circuit Court on July 21, 1966. Burnside v. Byars⁴⁰ and Blackwell v. Issaquena County

³⁹. Ibid.

⁴⁰. 363 F. 2d 744 (1966)
Board of Education\textsuperscript{41} do, for the first time, extend to high school students the constitutional rights to freedom of speech. Both decisions centered about expulsion of students who persisted in wearing "Freedom Buttons" in violation of school rules. The students alleged their First Amendment right to freedom of speech was being denied them for want of due process of law found in the Fourteenth Amendment. Blackwell upheld the suspensions because the students involved were causing substantial disruption to the school. Burnside, on the other hand, disallowed the suspensions for in their exercise of free expression, the students did not disrupt the educational process.

Aside from the Barnette decision, Burnside is the first major successful litigation of public school pupils against an educational institution involving First Amendment rights. Just as the Gitlow\textsuperscript{42} decision in 1925 paved the way for future incorporation of the constitutional right of free speech to adult citizens, Burnside extended this same First Amendment right to public school pupils. To quote the Court: "The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school

\textsuperscript{41} 363 F. 2d 749 (1966)

\textsuperscript{42} Gitlow v. New York, 268 U.S. 652 (1925)
system."\(^{43}\)

The Fifth Circuit Court went on to declare the right of free speech to be a constitutional right of high school pupils saying, "They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."\(^{44}\) The limitations imposed on the right of a school pupil to free speech outlined in the Blackwell and Burnside decisions will be discussed in detail in a later section of this study.

One year later the Supreme Court considered the problem of minors as non-citizens without constitutional rights in In Re Gault,\(^ {45}\) 1967. Gerald Gault, age 15, had been on probation for six months when he and another boy made an obscene phone call and were subsequently caught. After a hearing, Gault was ordered confined to the State Industrial School in Arizona for the period of his minority. The decision resulted in a six-year sentence in the reformatory. The decision was taken to the Supreme Court of the United States. Gault, because he was a minor, alleged he had been denied the basic

\(^{43}\) Burnside v. Byars, 363 F. 2d 744, 748 (1966)

\(^{44}\) Ibid., p. 749.

\(^{45}\) 387 U.S. 1 (1967)
rights of: notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review.

In overturning Gerald Gault's confinement order, the Supreme Court, in a most important pronouncement, declared "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." The reasons the Supreme Court used in adjudicating Gault are important when considering constitutional rights of public school pupils. By stating that Gerald Gault, a minor of 15, had constitutional rights guaranteed by the due process clause of the Fourteenth Amendment, the door was now open to the expansion and elaboration of constitutional rights through subsequent court decisions. The Court in Gault continued, "If a child is delinquent—the State may intervene. In doing so it does not deprive the child of any rights, because he has none. It merely provides the custody to which the child is entitled."

The Court also questioned the Juvenile Court system by stating,

Juvenile court history has...demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and has not always produced fair, efficient, and effective procedures. Departure from established principles

46. Ibid., p.
47. Ibid.
of due process have frequently resulted not in an enlightened procedure, but in arbitrariness.\textsuperscript{48}

As far as a juvenile is concerned, the Court said, "...[T]he essentials of due process may be more impressive than therapeutic."\textsuperscript{49} The same logic is being applied by the courts as they consider school disciplinary policies today.

The essence of Gault rested on the dichotomy between justice for an adult and justice for a minor. In Arizona, for example, an adult's maximum punishment would have been a fine of five to fifty dollars or imprisonment for not more than two months. Instead, Gault, a minor, received a six year sentence. Also, defendants over the age of 18 would have federal constitutional protection and Arizona constitutional and legal rights.

The Gault decision is most significant to this study of students' constitutional rights for a number of reasons. First, the fact that the Supreme Court of the United States announced that constitutional rights were "not for adults alone," expands constitutional protection to non-adults. This also strengthened the Fifth Circuit Court's ruling in Burnside which granted freedom of speech rights to high school pupils. Secondly, the Supreme Court reminded the State that it can no longer treat minors arbitrarily however benevolently the State's intentions are. This same reasoning applied to Gault in dealing with the

\textsuperscript{48} Ibid.

\textsuperscript{49} Ibid.
Juvenile Courts could thereafter be applied to another agent of the state acting as *parens patriae*, the public school system. Thirdly, the decision paved the way for the Supreme Court to apply the Fourteenth Amendment to guarantee public school pupils a measure of constitutional protection.

In 1969 the most significant court decision to date in the area of student constitutional rights was handed down by the Supreme Court. The Supreme Court in this important case first declared that, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." Justice Fortas, in delivering the opinion stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In holding that students have the constitutional right to free speech and expression the court decided that the wearing of armbands by public school pupils was a lawful exercise of the right to free expression in school. The court reasoned, "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more

than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.  

The burden of showing material and substantial interference with the educational process before denial of freedom of speech or expression could be curtailed was placed on the school officials in *Tinker*. The boundaries of the *Tinker* decision will be discussed in detail later in this study, but the important thing to note here is that public school pupils had been granted the First Amendment right of freedom of speech by the Supreme Court of the United States. As in previous decisions, again the importance of the due process clause of the Fourteenth Amendment was evident, for it is used to expand the scope of constitutional protection to persons heretofore not covered by that protection, public school pupils.

**SUMMARY**

From *Barnette*, where the Supreme Court declared public school pupils have First Amendment rights to the free exercise of religion, to *Dixon*, where procedural due process rights were granted to college students, to a federal court ruling in *Burnside*, allowing high school students free expression, to the Supreme Court's notion that constitutional rights "were not for adults alone" in *Gault*, finally to the *Tinker* decision which expanded constitutional protection to public school pu-

53. Ibid., p. 738.
pils by the Supreme Court, can be seen an evolutionary process of the development of fundamental fairness or due process of law for students. The process by which public school pupils have gained a measure of constitutional protection is thus closely analogous to the broader expansion of constitutional rights to all citizens. Once the Supreme Court confirmed the principle that constitutional rights should be afforded to public school students, the inevitable began to occur. Courts, through a broader interpretation of the concept of due process of law found in the Fourteenth Amendment, began to extend other constitutional rights in the Bill of Rights to public school pupils just as the courts had done for adult citizens as indicated in Chapter Two.

The major court decisions defining the boundaries and scope of public school pupils' constitutional rights in the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Amendments, as well as the judicial reasoning for their decisions, will be the topics for subsequent chapters in this study. The most significant area of student constitutional rights, that of free expression in the First Amendment, will be examined first.
CHAPTER IV
FREE EXPRESSION AS A STUDENT FIRST AMENDMENT RIGHT

Symbolic Speech

There is no question today that public school pupils have the First Amendment right of freedom of speech. Tinker, as seen in the previous chapter, afforded students this right. The task of the Courts today is to determine the scope and boundaries of student First Amendment rights. Interestingly enough, student suits alleging a violation of freedom of speech have not involved speech per se but symbolic acts of "expression" such as; armbands, buttons, dress, hair and flag saluting. The Supreme Court has repeatedly held, that non-speech activities closely akin to "pure speech" are entitled to comprehensive protection under the First Amendment. The systematic expansion of free speech to cover non-speech activities can be seen in a number of recent Supreme Court decisions.

In 1940, the right to picket became a constitutionally protected act of freedom of speech in Thornhill v. Alabama. During a labor dispute, the constitutionality of an Alabama law was challenged. The law stated:

2. Ibid., p. 736.
3. 310 U.S. 89 (1940)
Loitering or picketing forbidden. Any person or persons, who without a just cause or legal excuse therefore, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent to influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business.4

Labor leaders in Alabama challenged the statute on grounds it denied them the rights of free speech, assembly, and petition. The right to peacefully picket, denied them by the Alabama statute, they asserted, should be a constitutionally protected act of free speech. The Supreme Court agreed with the assertion and declared Section 3448 unconstitutional. The Court first pointed out the importance of protecting freedom of speech as follow:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential

4. Alabama Code 1923 Section 3448
to effective exercise of the power of correcting error through the process of popular government.5

We think that Section 3448 is invalid on its face. The freedom of speech and of the press guaranteed by the Constitution embraces at the least liberty to discuss publically and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.6

In the 1960's, court decisions resulted in the expansion of freedom of speech to still other areas of non-speech activities. Edwards v. South Carolina,7 1963, afforded civil rights demonstrations First Amendment rights of freedom of speech and assembly. In the Edwards decision, Negro high school and college students peacefully marched to the State House for the purpose of protesting laws discriminatory to the citizens of South Carolina. The demonstrators sang patriotic and religious songs, clapped their hands, and stamped their feet outside the Capitol. They were ordered by the police to leave the premises. When they failed to comply, arrests were made on the grounds of breach of the peace. The Supreme Court overturned the breach of the peace convictions by the State of South Carolina on the grounds First Amendment rights were violated; thus, the right of peaceful demonstrations became an act of freedom of speech or expression.

Another form of freedom of speech was secured by the courts in Brown v. Louisiana, 1966. Brown, a Negro, sat

5. Ibid., p. 95.
7. 372 U.S. 229 (1963)
down in a public library to protest its segregation rule. Upon his refusal to leave the library, Brown was arrested and convicted of breach of the peace and failure to disperse or move on in a public building when ordered.\(^8\) The Supreme Court in declaring Brown's action as an expression of free speech said,

We are dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and assembly, and freedom to petition the Government for a redress of grievance... As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be...\(^9\)

Other civil rights cases\(^10\) have strengthened the Supreme Court's contention that demonstrations are symbolic speech activities to be constitutionally protected.

**Limits on Free Expression**

An important point to consider in the study of First Amendment rights of free expression is the extent to which governments may restrict the exercise of that expression. The past affords us with many examples where a governmental

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8. 383 U.S. 131 (1966)

9. Ibid., p. 142.

interest was compelling enough to restrict free speech. In Schenck v. United States, 1919,\textsuperscript{11} the Espionage Act of 1917 was challenged on the grounds it violated the First Amendment right of freedom of speech. The Supreme Court asserted that free speech was not an absolute right and was never intended to be so. Mr. Justice Holmes in Schenck announced the now famous "clear and present danger" test on free speech activities. He stated, "The most stringent protection of free speech would not protect a man in falsely shouting fire in an theatre and causing a panic."\textsuperscript{12} In sustaining Schenck's conviction and upholding the validity of governmental interest in restricting his speech the Court went on to say, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."\textsuperscript{13}

Gitlow, mentioned earlier, is another significant decision where free speech was allowed to be restricted by a compelling governmental interest. Even though the Supreme Court expanded freedom of speech as against state as well as federal intervention through the due process clause of the Fourteenth

\textsuperscript{11} 249 U.S., 47 (1919)
\textsuperscript{12} \textit{Ibid.}, p. 52.
\textsuperscript{13} \textit{Ibid.}, p. 56.
Amendment, Gitlow's conviction for distributing a document advocating the overthrow of the United States Government was sustained.

However, the Court took a different view in Terminiello v. Chicago,14 1949, where it upheld a controversial case involving the issue of free speech. Terminiello, in addressing a Chicago group called the Christian Veterans of America, condemned the conduct of some one thousand protesters outside the auditorium and, at the same time, vigorously and viciously criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare. He was arrested and convicted of disorderly conduct by the City of Chicago. In the often quoted opinion overturning Terminiello's conviction, the Supreme Court established guidelines for those who would restrict the First Amendment right of free speech.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at unsettling effects as it presses for acceptance though not absolute,... is nevertheless protected against censorship or punishment, unless shown of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.15

14. 337 U.S. 1 (1949)
15. Ibid., p. 4.
The Court concluded its eloquent pronouncement by asserting that, "There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."\(^{16}\)

However, in the decade that followed Terminiello the courts became more restrictive of free speech due largely to the fear of communism. Dennis \textit{v. United States},\(^{17}\) 1951, sustained the conviction of communist party members who sought to overthrow the government by force and violence. The Court said:

Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.\(^{18}\)

The pendulum began to swing back to the "clear and present danger" test advocated by Justice Holmes beginning with the Yates\(^{19}\) decision in 1957. The Courts today take a position on restrictions of free speech more in line with the

\begin{itemize}
  \item[16.] Ibid., p. 4-5.
  \item[17.] 341 U.S. 494 (1951)
  \item[18.] Ibid., p. 867.
  \item[19.] Yates \textit{v. United States}, 354 U.S. 298 (1957)
\end{itemize}
Terminiello decision of 1949.

By 1966 there were ample judicial interpretation that would allow the courts to expand the scope of the First Amendment to include symbolic speech activities, such as black armbands in the public schools. Also, there were ample precedents to determine under what circumstances acts of expression could or could not be restricted by the state.

Burnside and Blackwell

Burnside and Blackwell, mentioned briefly in Chapter Three, were purposely decided on the same day by the Court of Appeals for the Fifth Circuit. In Blackwell students were suspended from a public school for wearing "SNCC" buttons; they were forcing buttons upon unwilling receptors, disrupting classes, and displaying hostility and discourtesy throughout the school. As a result, the students were not allowed to wear the freedom buttons in school. Those refusing to comply with the school rule were suspended, resulting in the litigation.

The Court, stressing the importance of the issue, said, "Cases of this nature, which involve regulations limiting freedom of expression and the communication of an idea, which are protected by the First Amendment, present a serious constitutional question. A valuable constitutional right is involved and decisions must be made on a case basis, keeping in mind always the fundamental constitutional rights
of those being affected." The suggestion that these issues be decided on a case by case basis is a crucial one, for the courts have done just that in litigation on student constitutional questions.

In upholding the suspension of the students in *Blackwell*, the Fifth Circuit Court went on to say, "The constitutional guarantee of freedom of speech 'does not confer an absolute right to speak' and the law recognizes that there can be an abuse of such freedom. In each case courts must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The court concluded by stating that, "In this case the reprehensible conduct described above was so inexorably tied to the wearing of the buttons that the two are not separable."

*Burnside*, on the other hand, was decided in favor of suspended pupils for material or substantial disruptions were not created by the wearing of the buttons in their school. The Court went to great length to point out that school officials, as agents of the state, are responsible for maintaining discipline necessary in the educational process.

The establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of class-

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21. Ibid., pp. 753-754.

22. Ibid., p. 754.
room learning. In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations be reasonable.

Thus school rules which assign students to a particular class, forbid unnecessary discussion in the classroom and prohibit the exchange of conversation between students are reasonable even though these regulations infringe on such basic rights as freedom of speech and association, because they are classroom activities.23

In Burnside, as opposed to Blackwell, students were expelled for violating a no button regulation, not for causing disruptions. The Court in an effort to abate the fears of school officials that the judiciary might usurp their prerogatives, pointed out, "We wish to make it quite clear that we do not applaud any attempt to undermine the authority of the school. We support all efforts made by the school to fashion reasonable regulations for the conduct of their students and enforcement of the punishment incurred when such regulations are violated. Obedience to duly constituted authority must be instilled in our young people."24

The Court concluded in Burnside, "They cannot infringe on their students' rights to free and unrestricted expression, as guaranteed to them under the First Amendment to the Consti-

24. Ibid., p. 749.
tution, where the exercise of such rights in the school buildings and schoolrooms does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 25 The "material and substantial disruption" test, used by the Fifth Circuit Court in noting the differences between Blackwell and Burnside, was also adopted by the Supreme Court in *Tinker*.

**Tinker**

*Tinker v. Des Moines Independent Community School District*, 1969, arose from the suspension of public school pupils, one of them a junior high school student, from school until their black armbands were removed. The students were wearing the armbands to protest United States involvement in the Vietnam War. The protestors caused no disruptions and they did not infringe upon the rights of others. They were not allowed to enter the schools solely because of the black armbands.

Justice Fortas, in delivering the opinion of the Court, first acknowledged that public school pupils do in fact have constitutional rights. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitution-

25. Ibid.
al rights to freedom of speech or expression at the schoolhouse gate." After recognizing that students do have First Amendment rights, Justice Fortas noted the obvious problems that inevitably arise.

Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. The problem posed by the present cases does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. There is here no evidence whatever of petitioners interference, actual or nascent, with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

In upholding the right of the students to wear the black armbands in this case, it is worth considering at length the reasoning of the Court in reaching this landmark decision. The judicial reasoning in Tinker closely follows the attitude toward free speech found in Terminiello.

In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national

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27. Ibid., p. 737.
strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.  

On the right of free expression the Court said,

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. ...Our independent examination of the record fails to yield reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. 

By promulgating the ban on armbands, the school officials felt they were avoiding possible disruptions that might occur in the future. As just noted, the school officials in Tinker were mot justified in the prohibition of armbands because they only anticipated disruptions. The Court asserted that, "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." Since the school officials offered no evidence that actual material and substantial disruptions did, or would occur, the rule was held unconstitutional.

The Court went on to make pronouncements that could ultimately affect the fundamental relationship between the public school pupil and his school.

28. Ibid., pp. 737-738.
29. Ibid., p. 738.
30. Ibid., p. 739.
In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.31

The reasoning in Tinker continues, "A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even in controversial subjects like the conflict in Vietnam...."32

The test used to determine if a student's rights may be superseded by state action is outlined by Justice Fortas. He said a student may be free to express his opinion,"... If he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."33 Clearly, the Supreme Court accepted in Tinker

31. Ibid.
32. Ibid., p. 740.
33. Ibid.
the guidelines for regulating a student's constitutional rights suggested by the Fifth Circuit Court in Burnside.

The Court concluded Tinker by reminding all that, "The Constitution says that Congress and the States may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or the supervised and ordained discussion in a school classroom." 34

Before considering the impact of Tinker and the cases that have since followed in the lower federal courts, it is worth noting the differences expressed by the minority on the highest bench. Justice Stewart concurred in the Tinker decision but added, "I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults." 35

Justice Black, a foremost proponent of constitutional rights for adults, dissented in Tinker. He feared first that the courts would be inundated with all sorts of suits where students would seek to invalidate school rules on constitutional grounds. The making of school rules and regula-

34. Ibid.

35. Ibid., p. 741.
tions would be effectively transferred to the Courts. To quote Justice Black in his Tinker dissent, "The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected officials of State supported public schools... in the United States is in ultimate effect transferred to the Supreme Court." 36

He went on to point out that children, because of their immaturity, do not possess the same fundamental rights as adults. "It may be that the Nation has outworn the old-fashion slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach." 37 Black also reminded the Court one of the realities of our society.

We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens - to be better citizens... One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. 38

Justice Black concluded his dissent with a warning.

"This case, therefore, wholly without constitutional reasons

36. Ibid.
37. Ibid., p. 745.
38. Ibid., p. 746.
in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. Justice Black's dissent raised some very real problems for the future of public education. Those who have been skeptical of the Supreme Court's wisdom in extending constitutional rights to public school pupils, have also echoed Black's criticism. However, litigation involving public school pupils resulted because of abuses—abuses that Justice Black would be the first to condemn if adults were the victims of the constitutional abuses in public education. Ultimately, adult citizens, whom Justice Black so vigorously insisted should be scrupulously afforded constitutional protection of the Bill of Rights, possessed a basic right to effect change denied to school pupils, the ballot box. Since public school pupils had no say in the institution so important in their lives, why shouldn't the Courts insist that students be guaranteed the very rudiments of justice, fair play, and due process?

At any rate, a close examination of subsequent litigation reveals that the Tinker decision still leaves many unanswered questions concerning First Amendment rights.

Critics assail Tinker on a number of points. First the circumstances surrounding the black armband controversy in Des Moines were almost completely devoid of disruptions—dis-

39. Ibid.
ruptions that might have impaired the educational process. In cases that have followed Tinker the lower courts have considered the merits of individual cases on the grounds of real or potential threats that disrupt school order. Acknowledging that students do have First Amendment protection, courts have been inconsistent at times in applying some sort of uniform material and substantial disruption test. Although Tinker offers little more than the material and substantial disorder formula as a guideline for the courts to follow, the court ruled that public school pupils are guaranteed constitutional protection through the due process clause of the Fourteenth Amendment. Using the due process clause, courts have begun to determine the scope and boundaries of student constitutional protection in cases since the 1969, Tinker decision. This study will now examine the significant post-Tinker freedom of speech cases which have helped to determine to what extent student free speech is guaranteed by the United States Constitution.

Recent Decisions Upholding Student Acts of Free Expression

Two recent Federal District Court decisions have upheld students' free speech rights involving the Pledge of Allegiance in a public school. In Frain v. Baron, 1969, a

student refused to leave his homeroom during the daily Pledge of Allegiance. School officials gave him the option of standing silently or leaving the room while the Pledge was taking place. These options were granted to prevent disorder in the classroom. The plaintiff felt the words "with liberty and justice for all" were not true in America and he considered his exclusion from the room a punishment for exercising his constitutional rights. He urged not only a right of non-participation but a right of silent protest by remaining seated.

The Court first acknowledged the student's new legal status by pointing out, "The original concern with limitation of the State's power to compel a student to act contrary to his beliefs has shifted to a concern for affirmative protection of the student's right to express his beliefs." 41 They continued by asserting that, "The student is free to select his form of expression, so long as he does not materially infringe the right of other students or disrupt school activities." 42 In deciding in favor of the student, the Court concluded by stating, "The right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be," 43 is his

42. Ibid., p. 32.
43. Ibid.
constitutionally protected right. The Federal District Court in New York followed pretty much the reasoning in Tinker to reach its conclusion to allow a public school pupil to sit in silent protest during the Pledge of Allegiance.

The situation was similar in a Florida decision where Andrew Robert Banks, a high school student, refused to stand during the Pledge of Allegiance. Because of Banks' violation of "School Board Policy" Regulation 6122 which stated: "Students who for religious or other deep personal convictions, do not participate in the salute and Pledge of Allegiance to the flag will stand quietly," he was suspended from school.

As in the previous Frain decision the Federal District Court in Florida felt Banks was exercising his First Amendment right of free expression. The Court in Banks explained, "The conduct of Andrew Banks in refusing to stand during the Pledge ceremony constituted an expression of his religious beliefs and political opinions. His refusal to stand was no less a form of expression than the wearing of the black arm-bands was to Mary Beth Tinker. He was exercising a right akin to pure speech." In concluding, the Court said, "The right to differ and express one's opinions, to fully vent his First Amendment rights, even to the extent of exhibiting disrespect to our flag and country by refusing to stand and participate

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45. Ibid., p. 295.
in the Pledge of Allegiance, cannot be suppressed by the imposition of suspension."  

Successful litigation in a Federal Court by high school students in 1970, expanded the scope of constitutional protection of off-campus literature. In Hatter v. Los Angeles City High School District, Shasta Hatter and Julie Johnson, two high school pupils, passed out leaflets off the school grounds urging students to boycott the annual chocolate candy drive. The two girls were protesting the school's dress code. Shasta Hatter was subsequently suspended by school officials for violating a rule, "requiring all matter distributed or exhibited on school property to be authorized by a responsible member of the administration." The Federal Court in California ordered Shasta Hatter reinstated on grounds that the school policy violated free speech and due process because it had a chilling effect upon a student's right of free expression.

A recent Federal Court decision included the right of peaceful demonstration as a constitutional right of expression afforded public school pupils. The litigation grew out of racial problems in John Tyler High School over the selec-

46. Ibid., p. 296.
47. 310 F. Supp. 1309 (1970)
48. Ibid., p. 1310.
49. Ibid.
tion of cheerleaders. The principal of the school arranged names on the ballots so that four white and two black cheerleaders would be elected. The blacks, numbering 38% of the school protested the way the names were arranged. The principal refused to change the ballots. Fires, vandalism, demonstrations and counter demonstrations followed. Things came to a head on March 21, 1971 when 250 to 300 blacks walked out of the school. When school officials asked the demonstrators to leave the school grounds they complied. The administration sought to prevent further disturbances by requiring each black student involved in the walkout to submit to an individual conference with his parents present in order to be re-admitted to school. Some of the black demonstrators refused to comply and remained excluded from school. These students sought court intervention because they alleged their First Amendment rights of free speech and assembly were being violated by the schools because the action for all practical purposes would prevent students from demonstrating their beliefs.

The Federal District Court in upholding the actions of the students said, "The regulation...arbitrarily prohibits all boycotts, sit-ins, stand-ins, and walk-outs without limiting its proscription to such activities involving misconduct or the educational environment."^51 The Court went

^51. Ibid., p. 533.
on to explain its reasoning. "It is apparent that all such activities are not materially and substantially disruptive per se. Even in the context of the educational environment, such speech-related activity, while traditionally subject to greater regulation of time, place and manner than is pure speech, cannot be completely prohibited. Free speech cannot be a right that is given only to be so circumscribed that it exists in principle but not in fact. To hold otherwise would be to limit a student's free speech rights to inappropriate settings as to make an exercise of those rights ineffectual."

The Federal District Court also reminded school officials that demonstrations could still be limited under certain circumstances. "Thus, while the school officials can certainly prohibit disruptive activity in the nature of boycotts, sit-ins, stand-ins, and walk-outs that materially interfere with the educational environment, they must do so in a manner that strikes at the very evil they wish to prevent rather than making all such activities, per se illegal." The Dunn decision rendered by a lower Federal Court extended the boundary of First Amendment free speech rights to include peaceful demonstrations by high school pupils. This was accomplished through the due process clause of the Fourteenth Amendment. Dunn also reflects a trend in judicial philosophy

52. Ibid., p. 534.
53. Ibid., p. 535.
especially evident since the 1969, *Tinker* decision. The District Court illustrated this trend by summarizing its position on First Amendment rights to freedom of speech..." and the right of the people peaceably to assemble, and to petition the Government for a redress of grievance, are held by minors as well as adults, and that these rights must be respected by governmental authority even in the context of the educational environment."^{54}

Public school pupils also gained the constitutional right to distribute anti-war leaflets in 1971.^{55} A junior high school student, who was denied permission by the Quincy School Committee to distribute an anti-war leaflet and "A High School Bill of Rights", appealed to the courts on the basis that his First Amendment rights were violated. The lower court sustained the school committee's rule but ordered the school not to interfere with the distribution of the material off the school grounds if it did not materially disrupt the school. The student appealed the lower court's decision upholding the committee's rule banning the distribution of his material inside the school.

The Appeals Court said, "...[We] find it unlikely that a court, on completion of this case on the merits, could uphold this attempt at regulating student conduct....[A]s to

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54. Ibid.

55. *Risman v. School Committee of City of Quincy*, 439 F. 2d 148 (1971)
be applied to First Amendment activities it is vague, and does not reflect any effort to minimize the adverse effect of prior restraint...."  

A case quite similar to Tinker arose in Texas when a group of Mexican-American children wore brown armbands to school protesting various educational policies and practices relating to their minority. The students were suspended until they removed their armbands for violating a dress code which stated in part, "Any act, unusual dress, coercion of other students, passing out literature, buttons, etc., or apparel decoration that is disruptive, distracting, or provocative so as to incite students of other ethnic groups will not be permitted." In defense of the suspension, "...Several of the school officials offered their conclusions or opinions that wearing of the armbands in violation of school policy was a disruption in of itself." The Federal District Court in Texas, however, followed the Tinker decision and found the threat of potential disruptions from the brown armbands not to be such to warrant restriction of this act of symbolic speech.

56. Ibid., p. 149.


58. Ibid., p. 665.

59. Ibid., p. 666.
The decisions reviewed in this section show how the courts have expanded the scope of a public school pupils' right of free expression since Tinker. Other recent decisions have, however, been decided against students thereby placing certain limitations on free expression.

Recent Decisions Limiting Student Acts of Free Expression

Baker v. Downey City Board of Education, 1970,60 affirmed the right of school officials to exclude obscene material from the school environment. In Baker, a student was suspended from school for distributing admittedly profane and vulgar material to other pupils outside the main gate of the campus. The plaintiff alleged his First Amendment rights were violated by the school's action. The Federal District Court hearing the case declined to use Tinker or Burnside to support the plaintiff's claim. Since the issue in Baker was profanity, Tinker and Burnside, which advocated the use of the material and substantial disruption test to determine to what extent government may regulate a student's First Amendment rights, was not a controlling precedent. The Court, in dealing with the profanity issue said, "First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas."61 The District 60. 307 F. Supp. 517 (1970) 61. Ibid., p. 527.
Court concluded by pointing out that high school students do not have the same comprehensive constitutional protection as adults. "The right to criticize and to dissent is protected to high school students but they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults." 62

Another case similar to *Baker* arised from student possession of obscene materials in school. In *Vought v. Van Buren Public Schools*, 63 1969, a high school student had been previously warned by the school principal not to bring obscene material to school. When he did a second time, expulsion resulted. In the course of the trial, the plaintiff admitted some of the words in the material in his possession were obscene, however, he alleged his First and Fourteenth Amendment free expression rights were being violated because of the expulsion. The Court was not in sympathy with the student and sustained the expulsion saying, "The exercise by the defendants here of their obligation to prescribe and control conduct in the schools' must be held to encompass the promulgation of rules concerning the extent to which and the conditions under which obscene materials may or may not be properly on the school premises." 64 In conclusion, the

Federal District Court in Michigan said, "...[W]e are constrained to conclude that the type of regulation here cannot be considered violative of this plaintiff's First Amendment rights."  

It would appear that Baker and Vought, although adjudicated by Federal District Courts, leave to school officials the discretion to determine what is and is not obscene on school property. Whether or not the material causes a disruption is not the test used to determine if this is a substantial governmental interest to restrict the use of the material. School officials can restrict a student's First Amendment right of free expression if, in the their view, the material is obscene. However, cases reviewed in the following section on the press show that materials on the school grounds must be judged by certain criteria before being excluded by school administrators as obscene.

A federal Circuit Court of Appeals in Katz v. McAulay, 66 1971, upheld a New York Board of Regents regulation prohibiting the solicitation of funds from the pupils in the public schools. Students challenged this rule when they were threatened with expulsion for distributing leaflets near the school and soliciting funds from their fellow students.

65. Ibid.
66. 438 F. 2d 1058 (1971)
They alleged the rule violated their First Amendment right of free speech. The Court did not feel a student's freedom of speech was violated, stating:

Pupils are on school premises in response to the statutory requirement that they attend school for the purpose of formal education. Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary pupils, as a captive audience, to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer, its effect is not so limited in time and it is plainly harmful to the operation of the public schools. If there is no regulation against it, literally dozens of organizations and causes may importune pupils to solicit on their behalves and is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation.67

The Court in Katz points out that the rule focused on a demonstrable harm and was constitutional. Therefore the right of pupils to solicit funds from school pupils even in the vicinity of the school grounds was not considered an act of "expression" protected by the Tinker decision.

Lipkis v. Caveney,68 1971, decided by the California State Supreme Court placed limits on when and where a public school pupil may exercise his right of free speech. Tom Lipkis sought a writ of mandate to compel Van Nuys High School

67. Ibid., p. 1061.

68. App. 96 Cal. Rptr. 779 (1971)
officials to grant him a permit to stage a rally in a lunch area during the noon hour. The school officials declined the permit because they felt a rally would materially disrupt the order in the school. The principal pointed out that Lipkis had the opportunity, as did any student, to express his opinions in recognized campus activities such as the Noon Forum and Discussion Group. They did not want to provide Lipkis with a captive audience while students were eating their lunches. In declining to issue the writ of mandate, the California Court reasoned, "We emphasize that appellant had adequate and concededly readily available forum in which to exercise his right to free speech and to ventilate views he entertained relative to any problems of his school, his country or the world. Puerile, abrasive and contemptuous behavior cannot be whitewashed by constitutional incantations, which, if we understand them, gave appellant the right to expose in non-obscene language even the most unpopular views but which do not require Van Nuys High School or the school system to guarantee to him on the school grounds a captive audience at the specific times he elects to address them... Our Constitution extends no such guarantees to appellant or anyone else." 69

Black high school students in Indiana, took a First Amendment complaint to a Federal Circuit Court without suc-

cess in 1970.\textsuperscript{70} The litigation resulted when Negro students who comprised 13\% of the high school population sought to ban what they consider symbols offensive to their race. They protested their school flag resembled a Confederate Flag, the athletic team called "Rebels", the glee club named the "Southern Aires" and homecoming queen the "Southern Bell." The Federal District Court rejected their contention that their First Amendment right of free speech was being impinged upon by the use of the offensive symbols. "Plaintiffs allege that the use of these symbols is offensive to the Black students at Southside, who comprise thirteen per cent of the enrollment, isflammatory, and has discouraged Blacks from participating in the various extracurricular activities of the school. They claim that due to the effect on the Black students, the symbols violate their First Amendment right of free speech."\textsuperscript{71} The Court pointed out that, "We fail to find any evidence in the record that the Black students' right of free speech and expression is being abridged by use of the Confederate symbols."\textsuperscript{72}

As a result of racial strife in a Chattanooga high school, the school board adopted a rule forbidding students from wearing "provocative symbols" on clothing. \textit{Melton v. Young,}\textsuperscript{73} 1971, challenged this regulation on First and Four-

\textsuperscript{70} \textit{Banks v. Muncie Community School}, 433 F. 2d 292 (1970)

\textsuperscript{71} \textit{Ibid.}, p. 297.

\textsuperscript{72} \textit{Ibid.}, p. 298.

\textsuperscript{73} 328 F. Supp. 88 (1971)
teenth Amendment grounds. Racial tension grew in the high school after successful protests by students resulted in the school athletic team's name "Rebels" and the school flag, the Confederate Flag, being changed. Police at one point were called in to restore order. In the midst of the charged atmosphere, Rod Melton insisted on wearing a Confederate Flag on his clothing. He was suspended for breaking the rule barring provocative symbols. The Federal District Court was not sympathetic to Melton's cause, citing the potentially explosive atmosphere at the high school as sufficient reasoning to abridge First and Fourteenth Amendment rights to free expression. The Court first reminded school officials of the scope of limits on First Amendment rights by saying, "... The First Amendment does not speak equivocally, but rather is broad and explicit in its scope. Regulatory measures, no matter how well intentioned or how sophisticated, cannot be employed by public bodies if their purpose or effect is to stifle, penalize, or curb the exercise of rights guaranteed by the First Amendment." 74 Continuing, the Court pointed out, "The exercise of free expression must on occasion be subject to some limitations, otherwise such institutions as churches, schools, and other places of public assembly, not to mention courtrooms themselves would become Towers of Babel." 75 Citing the reasoning in Tinker, the Court said, "Fin-

74. Ibid., p. 96.
75. Ibid.
ally it should be noted that 'symbolic speech,' although not always readily distinguishable from conduct and accordingly somewhat ill-defined in the law, is accorded First Amendment protection the same as 'pure speech.' Dispite the fact that symbols worn on clothing is an exercise of free expression protected by the Constitution, the Court in Melton did allow the ban on "provocative symbols" to stand because similar symbols had caused disruptions in the past. Tinker's "material and substantial" test applied in Melton did warrant a sufficient governmental interest to restrict First Amendment rights.

A recent Federal Court opinion, Hill v. Lewis, 1971, illustrates to what extent the Tinker decision can be used as a controlling factor in student exercise of free expression. Plaintiffs, students in 71st High School, Cumberland County, North Carolina, were suspended for wearing armbands in protest of United States policies in Vietnam. The situation was potentially explosive in the high school since 40% of the students' parents were military personnel stationed at Ft. Bragg, North Carolina. Before the students were suspended, counter-demonstrations produced red, white, and blue armbands, that caused chanting, congregating in hallways, and disruptions. Polarization between the two groups, the anti-war and pro-war

76. Ibid.

77. 323 F. Supp. 55 (1971)
students, resulted in a tense school situation. The Court, in sustaining the suspensions and the rule banning armbands, offered its interpretation of the Tinker decision.

The Court in Tinker found that the wearing of armbands was entirely divorced from any actually or potentially disruptive conduct by those participating in it, under the circumstances of that case. Tinker did not involve aggressive, disruptive action or group demonstrations. Tinker did not concern speech or action that intrudes upon the work of the school or the rights of other students. In Tinker the fear of disruption did not motivate the prohibition of armbands. The regulation was directed against the principle of the demonstration itself. The record in Tinker failed to disclose evidence that school officials had reason to anticipate that the wearing of armbands would substantially interfere with the work of the school or impinge upon the rights of other students. In Tinker the prohibition was directed at the wearing of black armbands. Tinker involved a small number of participants, and students were dismissed for the sole reason they wore the proscribed armbands.78

Looking at the situation in 71st High School as a whole, the record showed clearly there was reasonable apprehension that the threat of violence would produce a substantial and material interference on the rights of others.

Free Expression in a Racially Tense School Situation

Cases thus far considered on free expression, using the material and substantial formula in Tinker fall in line with the Supreme Court's interpretation of student First Amendment rights. However, one recent case79 that upheld a school board's

78. Ibid., p. 58.

right to restrict a student's First Amendment right of free expression, could place several limitations on that right if the precedent is followed by other courts. *Guzick v. Drebus* decided in 1969, and later sustained by a Federal Circuit Court in 1970, upheld a school board regulation that prohibited students from wearing buttons, emblems or other insignia not related to a school activity. The rule had been in effect for 40-years in an East Cleveland, Ohio high school.

As in many other northern urban areas, population shifts resulted in a change in the ethnic make-up of the student body. A once predominately white school, Shaw High School, by the time of the *Guzick* decision, had become a 70% black and had been the scene of racial violence. School officials, fearing potential disorders, kept the rule in force resulting in the *Guzick* litigation.

Thomas Guzick, was suspended for wearing a button that said:

April 5 Chicago  
GI - Civilian  
Anti-War  
Demonstration  
Student Mobilization Committee

Both the District and the Circuit Courts used *Blackwell* in sustaining the rule prohibiting all buttons in the high school. The District Court pointed out that, "The presence
of these emblems, badges, and buttons are taken to represent, define and depict the actual division of the students in various groups.\textsuperscript{80} The Court continued, "... The buttons tend to polarize the students into separate, distinct, and unfriendly groups."\textsuperscript{81} In concluding, the Court said, "... That if this policy of excluding buttons and other insignia is not retained, some students will attempt to wear provocative or inciting buttons and other emblems,"\textsuperscript{82} Therefore, they felt all buttons must be excluded. The material and substantial test was used as the lower Federal Court said, "The wearing of buttons and other insignia will exacerbate an already tense situation... [which] will disrupt and interfere with the normal operation of the school."\textsuperscript{83}

The reasoning of the Federal Circuit Court followed that of the lower court in Guzick. "In our view, the potentiality and the immenseness of the admitted rebelliousness in the Shaw students support the wisdom of the no-symbol rule."\textsuperscript{84} Here the Court applied a sort of "clear and present danger" test to the public school setting. The Appeals Court pointed out the realities of the situation. "We will not attempt an extensive review of the many great decisions which have

\textsuperscript{80} Guzick v. Drebus, 305 F. Supp. 472, 476 (1969)
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid., p. 477.
\textsuperscript{83} Ibid., p. 479.
\textsuperscript{84} Guzick v. Drebus, 431 F. 2d 594, 600 (1970)
forbidden the abridgement of free speech. We have been thrilled by their beautiful and impassioned language. They are a part of our American heritage. None of these masterpieces, however, were composed or uttered to support the wearing of buttons in high school classrooms. We are not persuaded that enforcement of such a rule as Shaw High School's no-symbol proscription would have excited like judicial classics. Denying Shaw High School the right to enforce this small disciplinary rule could, and most likely would, impair the rights of its students to an education and the rights of its teachers to fulfill their responsibilities."

The Circuit Court went on to conclude that,

We must be aware in these contentious times that America's classrooms and their environs will loose their usefulness as places in which to educate our young people if pupils come to school wearing the badges of their respective disagreements, and provoke confrontations with their fellows and their teachers... The buttons are claimed to be a form of free speech. Unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammelled exercise of such right.86

The decision in Guzick creates a dilemma for future free expression litigation involving public school pupils. Blackwell, Hill and Melton, offered substantial evidence that stu-

85. Ibid.
86. Ibid.
dents, in expressing themselves, would or did cause material
and substantial disorders. The school officials in Guzik
could only predict substantial disorders would result for but-
tons had never before been allowed in the school.

An article in the Cleveland State Law Review points out
the inconsistencies between Tinker and Guzik. "The right to
express one's point of view on a politically controversial
issue such as the Vietnam War, in an orderly fashion, is
constitutionally protected in a racially homogenous high school
in Des Moines, Iowa; the same right is prohibited to students
in a high school in racially tense East Cleveland, Ohio."87
The article thereby asserts that, "Racial refinement will have
been engrafted onto the holding in Tinker,"88 if the Guzik
decision is upheld by the Supreme Court.

Summary

Students in the public schools today have been accorded
First Amendment protection by virtue of the Tinker decision
in 1969. Court decisions following Tinker have sought to
define the scope and boundaries of student free expression.
Within the permissible boundaries of free expression, public
school pupils are allowed to speak, demonstrate, perform acts

87. Ann Aldrich and Jo Anne V. Sommers, "Freedom of
Expression in Secondary Schools," Cleveland State Law Review,

88. Ibid., p. 170.
of symbolic protest, and wear things that denote symbolic speech.

However, limits have been placed on a student’s constitutional right to free expression by the courts. The most important limitation has been offered by the Supreme Court in Tinker. If, in the exercise of his right to express himself freely, a student materially and substantially disrupts the educational process, his free expression may be restricted. The courts have also restricted student free expression because of obscene material.

Still unresolved is the question of what causes a material and substantial disruption and whether or not First Amendment activities can be restricted if there is a threat of a potential disruption. The courts will have to decide these issues in the future.

Student First Amendment rights have also been expanded to include freedom of the press, the topic of the next chapter.
CHAPTER V
PUBLIC SCHOOL PUPILS AND FREEDOM OF THE PRESS

Legal Guidelines for the Press in General

As seen in the previous chapter of this study the judiciary through various court decisions has expanded the scope of free speech in the First Amendment to include symbolic acts of expression. The printed word certainly falls into this category. The printed word also has a measure of constitutional protection under freedom of the press in the First Amendment.

Students involved in controversies relating to printed matter in the public schools have therefore alleged, in addition to encroachment on their right to free expression, violations of their right to a free press. With the exception of some specific limitations to be examined later, a student's right to a free press is governed basically by the same guidelines spelled out for the press in general. The major Supreme Court decisions establishing the guidelines for the national press will be examined first.

A landmark case in which the Supreme Court began to define the boundaries of freedom of the press was Near v. Minnesota, 1 1931, considered earlier in this study. As

1. 263 U.S. 697 (1931)
the landmark case holding a state law unconstitutional for violating freedom of the press, *Near* prohibited states from exercising "prior restraint" over the press. The Supreme Court said that a state may, of course, properly forbid the publication of "lewd, lascivious, salacious, obscene and filthy" matter. However, a restriction of the press that in effect constituted prior censorship as in *Near* would not be allowed. The Supreme Court also pointed out in *Near* that whatever wrongs were published could appropriately be punished through the state's libel laws.

Another important freedom of the press decision was *New York Times Co. v. Sullivan*[^2] adjudicated in 1964. Civil rights activists had published a full page advertisement in the *New York Times* called "Heed Their Rising Voices" accusing the police of promulgating a "wave of terror" in Montgomery, Alabama. Written in rhetorical language the ad, if taken literally, was essentially untrue. Sullivan, a Montgomery public official responsible for the police department, sued the *Times* for libel. An Alabama Court awarded Sullivan damages. On appeal to the Supreme Court of the United States, however, the judgment was reversed.

In overturning the Alabama decision, the Supreme Court said: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering

[^2]: 376 U.S. 254 (1964)
damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."³

By requiring a public official to prove "actual malice" the role of the press as a watchdog over public officials' conduct in the performance of his job was effectively strengthened.

A 1957 case, Roth v. United States,⁴ defined the relationship between First Amendment rights of free speech and press to the topic of obscenity. The litigation grew out of a federal statute prohibiting the use of the mail for the distribution of obscene, lewd, lascivious or filthy materials. Roth was convicted under the statute in a federal court for using the postal system to mail obscene literature to his customers. The Supreme Court in upholding the trial court's conviction asserted that obscenity was not an expression protected by the First Amendment. The Court also agreed with the instructions the trial court offered to the jury in Roth.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon whom it is likely to reach. In other words you determine its impact upon the average person

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3. Ibid., pp. 279-280.

4. 354 U.S. 476 (1957)
in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourself does it offend the common conscience of the community by present-day standards?\(^5\)

The highest Court went further to define what might be obscene by stating, "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interests."\(^6\)

The Supreme Court in Roth therefore established a three part test to determine what materials might be considered obscene. First, if the material offends the common conscience of the community, secondly, if the matter in question is without redeeming social value and thirdly, if the material treats sex in such a way that appeals to prurient interest, restrictions may be imposed on the press by the state on the grounds of obscenity. The Roth test is still used by the courts today in determining what is obscene.

Another important free press case centered around the problem of licensing. A 1964 decision in Maryland established guidelines where a state could be allowed to censor

\(^5\) Ibid., p. 490.
\(^6\) Ibid., p. 488.
free expression. The controversy in Maryland centered around the State's refusal to license certain films it considered to be obscene. A statute required films to be submitted to a censor prior to their release. The Court, recognizing the difficulty in issuing licenses, pointed out that, "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." 7

The Supreme Court offered guidelines by requiring a censor to provide for procedural safeguards that would prevent the danger of a censor's decision from being final. Three such rules emerged from Freedman v. Maryland in the area of censorship.

1. The burden of proof must rest with the censor.
2. The censorship must be administered in such a way to insure the censor's decision is not final.
3. There must be procedures requiring judicial determination in order to impose valid final restraint.

These three rules are basic guidelines today for agencies to follow when censorship of material is being con-

7. Ibid., p. 56.
8. Ibid., p. 58.
sidered.

Ginsberg v. State of New York, 9 1968, raised the question of what might be obscene to minors. Ginsberg, an operator of a New York luncheon counter, was convicted under a New York criminal obscenity statute which prohibited the sale of obscene material to persons under seventeen. The charge resulted after Ginsberg had sold a "girlie" magazine to a sixteen year old boy. The magazine, however, was not considered obscene for adults. Ginsberg contended that the constitutional freedom of expression did not depend on a citizen being an adult or a minor. The Supreme Court rejected Ginsberg's contention and offered specific guidelines where material considered harmful to minors would be prohibited.

Harmful to minors means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(i) predominately appeals to the prurient, shameful or morbid interests of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

Controversies involving college presses have resulted in important judicial pronouncements on a student's right

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9. 88 S ct. 1274 (1968)

10. Ibid., p. 1284.
to a free press. Dickey v. Alabama,11 1967, affirming a college student's right to a free press has directly influenced a similar expanse of this right to public school pupils. In Dickey the Court said that, "A State cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a State supported institution."12 Dickey had been refused readmittance to one of Alabama's schools because of his controversial editorial in support of the University of Alabama's President's stand on the right of a free press in a university. Dickey ordered his reinstatement as a student. These cases provide the judicial framework by which litigation involving a public school pupil's right to a free press were decided upon by the courts in the late 1960's.

Student Suits Alleging Violation of Free Press

There are a sufficient number of court decisions now on a public school pupil's right to a free press establishing guidelines for school officials to follow when attempting to regulate student printed matter. Taken in


12. Ibid., p. 618.
chronological order, these decisions follow a pattern that firmly shows that students today have the constitutional right to freedom of the press.

A landmark case where public school pupils gained recognition of First Amendment rights directly related to the printed word was Zucker v. Panitz,\(^\text{13}\) 1969. Zucker, a high school student in New York, was denied the right to publish a paid advertisement in the school newspaper opposing the war in Vietnam. He challenged the decision on the grounds he was being denied his First Amendment right to freedom of speech. The defendant sought to advance the theory, "... That the publication is not a newspaper in the usual sense but is a beneficial educational device developed as part of the curriculum and intended to insure primarily to the benefit of those who compile, edit and publish it."\(^\text{14}\) School officials contended that only purely commercial ads would be accepted in the newspaper.

It is important to note here that the Federal District Court in New York viewed a high school newspaper as an instrument for students to express their opinions. The Court stated, "We have found, from review of its contents, that within the context of the school and educational environment, it is a forum for the dissemination of ideas."\(^\text{15}\) As

\(^{13}\) 299 F. Supp. 102 (1969)

\(^{14}\) Ibid., p. 103.

\(^{15}\) Ibid., p. 105.
a result, the Court took the view that to prohibit the political ad would deny Zucker the right to express his opinion on the Vietnam War in a recognized "forum for the dissemination of ideas". Holding in favor of Zucker, the Court reasoned, "It would be both incongruous and dangerous for this Court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted non-disruptive modes of communication, may be precluded from doing so by that same adult community." The Zucker decision established a precedent that subsequent courts have followed regarding the status of high school newspapers, mainly that they are vehicles open to students for the expression of their opinions.

Sullivan v. Houston Independent School District,17 1969 is an equally important landmark decision in the area of a student's right to a free press. The litigation resulted when two pupils from Sharpstown Junior/Senior High School in Houston, Texas were expelled because of their involvement in the production and distribution of a "newspaper" called the Pflashlyte which criticized school officials. School officials were particularly upset by Pflashlyte, since as an underground newspaper, it was not under the control of the school. Sullivan and Fisher, the two high school students

16. Ibid.
involved, had been distributing the publication across the street from the school and in various shops and stores frequented by students. Some students took the paper into class thereby causing minor disruptions. Upon questioning by the principal and the assistant principal, the two students admitted to distributing the newspaper. They were advised they were in serious violation of school regulations, especially because of their involvement in a "secret" organization, namely the Students For a Democratic Society. At the time of questioning by the school officials, neither student was informed that disciplinary action would be taken. Five days later, Sullivan and Fisher were both expelled for the remainder of the school year. In spite of the students' promise to stop the newspaper if readmitted, the expulsion remained in effect.

Using Tinker as the controlling influence, the Federal Court broadened the scope of the First Amendment protection to include newspapers in the public schools. The Court asserted, "...Freedom of speech, which includes publication and distribution of newspapers, may be exercised to its fullest potential on school premises so long as it does not unreasonably interfere with normal school activities." 18 However, the Court pointed out that a newspaper is subject

18. Ibid., p. 1340.
to some control by school officials even if it does not ma-
terially and substantially disrupt the normal process of ed-
ucation. Reasonable, non-discriminatory regulations regard-
ing the time, place, manner, and duration of distributing
a non-disruptive publication on school premises would be
valid. 19

The action taken by the school administration against
Sullivan and Fisher was considered even more questionable
since they were distributing the newspaper off the school
grounds. On this point the Court said, "In this Court's
judgment, it makes little sense to extend the influence of
school administration to off-campus activity under the the-
ory that such activity might interfere with the function of
education....School officials may not judge a student's be-
behavior while he is in his home with his family nor does it
seem to this Court that they should have jurisdiction over
his acts on a public street corner." 20 They reasoned that,
"A student is subject to the same criminal laws and owes the
same civil duties as other citizens, and his status as a
student should not alter his obligations to others during
his private life away from the campus." 21

19. Ibid.
20. Ibid.
21. Ibid., p. 1341.
The Federal District Court in Texas did leave room for possible exceptions to controlling off-campus activities. "Arguable, misconduct by students during non-school hours and away from school premises could, in certain situations, have such a lasting effect on other students that disruption could result during the next school day. Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This Court considers even this power to be questionable."\(^{22}\) The Court continued, "However under any circumstances, the school certainly may not exercise more control over off-campus behavior than over on-campus conduct."\(^{23}\)

The fact that the Pf lashlyte was primarily intended for discussions and comments affecting student-administrator relations, the disruptions were only minor, and the two students were subject to the laws governing libel, slander, and obscenity, the District Court held in favor of the two students. Sullivan effectively "incorporates" a public school pupil's right to a free press by stating, "...Excepting only oral expression, the publication of a 'newspaper' is First Amendment activity in its purest form."\(^{24}\)

A case similar to Sullivan resulted when a student was suspended for writing an off-school newspaper critical of

\(^{22}\) Ibid.

\(^{23}\) Ibid.

\(^{24}\) Ibid., p. 1342.
school policies and authorities. Scoville, the student involved, was suspended for the remainder of his second semester for "gross disobedience and misconduct". The school board noted that Scoville's suspension was not because he published and distributed an unauthorized newspaper on the school grounds, but because of the objectionable content of the paper. "Grass High", the publication in question, was a newspaper of fourteen pages containing poetry, essays, movie and record reviews, and a critical editorial. The school officials objected to parts in "Grass High" that called upon students to destroy material given to them by the school for their parents. Also considered objectionable were comments alluding to the Dean as a man possessed with a "sick mind" and a statement, "Oral sex may prevent tooth decay".

In using Tinker, the Circuit Court posed the question at hand as, "...Whether the writing of "Grass High" and its sale in school to sixty students and faculty members could reasonably have led the board to forecast substantial disruption of a material interference with school activities." The Court felt it did not and decided in favor of Scoville. In doing so, the school officials were reminded of one of their primary functions in an educational institution. "While

26. Ibid., p. 12.
recognizing the need for effective discipline in operating schools, the law requires that the school rules be related to the State interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly chilled."

Dealing with the objectionable parts of the newspaper, the Appeals Court did not condone its content but considered it within the confines of a student's right to free expression. "The 'Grass High' editorial imputing a 'sick mind' to the Dean, said the Court, "reflects a disrespectful and tasteless attitude toward authority." The Court further said about the statement, "Oral sex may prevent tooth decay", "This attempt to amuse comes as a shock to an older generation but today's students in high school are not insulated from the shocking but legally accepted language used by demonstrators and protestors in streets and on campuses and by authors of best-selling modern literature."  

It is clear from Sullivan and Scoville that exclusions of student newspapers could only be allowed where Tinker's material and substantial disruption test could be met. Therefore, the First Amendment rights to a free press, is in fact, a student constitutional right. Scoville is also influenced by New York Times v. Sullivan for the "sick mind"

27. Ibid., p. 14.
28. Ibid.
29. Ibid.
statement, although in poor taste, would not meet the test of "actual malice". Finally, Scoville also used the formula suggested by the Supreme Court in Roth where the publication in question was judged by present-day standards of the particular community involved to determine if it was objectionable. As seen, the Appeals Court judged that "Grass High" was not obscene by present-day standards.

Another important case in the area of a students' right to a free press reaching the Federal Appeals Court system is the recent Eisner v. Stamford Board of Education, 30 1971. Before deciding the case, the Circuit Court suggested the complexity of the problems involved in this particular area of constitutional law by saying, "The problems raised by this case defy geometric solutions. The best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts. One must be satisfied with such present solutions and cannot expect a clear view of the terrain beyond the periphery of the immediate case. It is a frustrating process which does not admit of safe analytical harbors." 31

The Eisner controversy resulted when students in the Stamford, Connecticut school system challenged a school board rule requiring newspapers that were to be distributed

30. 440 F. 2d 803 (1971)

31. Ibid., pp. 804-805.
in school would first have to be submitted to the administration for approval. The lower court\(^\text{32}\) held the administration's rule to be an unconstitutional abridgment of the students' First Amendment rights. The Federal District Court relied heavily on *Near v. Minnesota*, a decision, as seen, that held prior restraint of speech and press unconstitutional. The Federal Appeals Court sustained the lower court's decision and the reasoning in the case has important implications for public school pupils and freedom of the press.

The rule in question promulgated by the Stamford School Board stated:

The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitation:

No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.

In granting or denying approval, the following guidelines shall apply.

No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.

In affirming the lower court's decision in *Eisner*, the Appellate Court first expanded on the Stamford Board's rule


on school newspapers. They said, "Unless the policy...pur-
ports to delegate greater power to restrain the distribution
of disruptive matter that Tinker allows, or unless it other-
wise unreasonably burdens students' First Amendment activity,
it is valid."\(^{34}\) The Court went on to say that, "The policy
does not in any way interfere with students' freedom to dis-
seminate and receive material outside school property; nor
does it threaten to interfere with the predominate respon-
sibility of parents for their children's welfare. The state-
ment [the board's regulation] is, therefore, in many ways nar-
rowly drawn to achieve its permissible purposes, and indeed
may fairly be characterized as a regulation of speech, ra-
ther than a blanket prior restraint."\(^{35}\) The problem with the
rule was that the Board did not make specific the kinds of
disruptions it considered illegal, the criteria for censor-
ship and where material could be distributed.\(^{36}\)

However, in affirming the District Court's decision in
Eisner, the higher court did so with significant reserva-
tions. The difference in the judgment of the Appeals Court
centered around the lower court's belief that all prior re-
straints are unconstitutional as seen in Near v. Minnesota,
and that censors must follow the procedures stipulated in
Freedman v. Maryland. Near, the Appellate Court pointed out,

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did not invalidate all previous restraint and that restraints on student newspapers would be constitutional if the "material and substantial" disruption test could be met. The Court further felt that requirements set forth for censorship in *Freedman* should not necessarily apply to student newspapers. *Freedman*, for example, required judicial action before a final restraint by a censor could be legal.

Since the purpose of the Stamford School Board's rule was not to suppress but to prevent disorders, the Federal Circuit Court had this to say. "We do not regard the Board's policy as imposing nearly so onerous a 'prior restraint', as was involved in *Freedman*. Also, we believe that it would be highly disruptive to the educational process if a secondary school principal were required to take a school newspaper editor to court every time the principal reasonably anticipated disruption and sought to restrain its cause. Thus, we will not require school officials to seek a judicial decree before they may enforce the Board's policy."37 *Eisner*, however, suggested that "...If students choose to litigate, school authorities must demonstrate a reasonable basis for interference with student speech, and that courts will not rest content with officials' bare allegation that such a basis existed."38 The procedure requiring expeditious

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37. Ibid., p. 810.
38. Ibid.
review in *Freedman*, however, was held to be valid in censoring student newspapers.

Details were further given why other aspects of the board's policy made it invalid.

This policy is also deficient in failing to specify to whom and how material may be submitted for clearance. Absent such specifications, students are unreasonably proscribed by the terms of the policy statement from distributing any written material on school property, since the statement leaves them ignorant of clearance procedures. Nor does it provide that the prohibition against distribution without prior approval is to be inoperative until each school has established a screening procedure.

As a result of the details spelled out by the Court for the Stamford School Board on regulating student newspapers, *Eisner* is particularly important for it offers any school board guidelines for making rules and regulations on this sensitive topic.

In the previously mentioned controversy over the student newspaper *Pflashlyte* a Federal District Court in Texas offered specific guidelines for the Houston School Board to follow when regulating student printed matter. The guidelines stated:

1. The rule must be specific as to places and times where possession and distribution of published materials is prohibited.


2. The rule must be understandable to persons of the age and experience of covered students.

3. The rule must not prohibit or inhibit conduct which is orderly, peaceful and reasonably quiet and which is not coercive of any other person's right to accept or reject and written material being distributed subject to the rule.

4. The rule may prohibit such distribution at times and in places where normal classroom activity is being conducted. Such rule may not prohibit such distribution at other times and places unless such prohibition is necessary to prevent substantial and material interference with or delay of normal school function.\(^{41}\)

The student press controversy in Houston was again in court two years later in a second *Sullivan v. Houston Independent School District*.\(^{42}\) The facts in the more recent *Sullivan* decision were these. Paul Kitchen, a junior at Waltrip Senior High School, was selling a publication called *Space City* to students off the school grounds. The principal bought a copy of the underground newspaper and later in the day, suspended Kitchen for breach of school board policy until a conference could be scheduled with his father. The principal heard the word "goddamn" as Kitchen was leaving his office after being notified of his suspension. The suspension hearing was scheduled six days later. On the day of the suspension hearing Paul was once again selling *Space City* near the school grounds. During a confrontation with

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41. Ibid.\(^{\text{,}}\) p. 1152.

42. 333 F. Supp. 1149 (1971)
the principal the student used the word "fuck" after he was threatened with arrest. Subsequently, the police were called in to arrest Kitchen and he was later released. A hearing was held in the principal's office and an expulsion was ordered for remainder of the semester. The assistant superintendent later affirmed the expulsion order leading to the litigation. The principal explained that he suspended the student because he deemed the newspaper to be obscene. This decision was based on the fact an editorial used the phrase "High School is fucked up".

The regulations governing student publications adopted by the board after the injunction in the first Sullivan decision said essentially that: "A copy of the publication... will be taken...to the principal, who may take up to one school day for the purpose of reviewing such publication before its general distribution". The regulation also provided for the board's attorneys to review the publication in question to determine if it "contains libelous or obscene language or advocates illegal action or disobedience to published rules on student conduct adopted by the Board of Trustees".

The principal, however, did not follow the rules established by the board for he suspended Kitchen the same day because in his opinion, the publication was obscene. Further, it was not reviewed by an attorney as the rules required when the issue of obscenity was raised. The Court, in dealing with the obscenity question held that the phrase "High School is fucked up" was not obscene. The phrase did
not meet the Roth test of treating sex in a manner appealing to prurient interests since, according to present-day standards, the expression meant the school was in bad shape and had nothing to do with sex. Furthermore, the phrase was taken out of context, something forbidden in Roth, for the publication, judged as a whole by experts, was considered to have substantial educational value. The Baker and Vought decisions in the previous chapter upholding the school official's judgment that the materials in question were obscene differs from Sullivan because the students themselves admitted in these two cases that parts of their publications were obscene. Finally, the regulations that allowed a school principal to review publications prior to distribution and for attorneys to determine if a student publication might be obscene, was declared unconstitutionally vague and overbroad.

The Court in the second Sullivan decision did make a significant point by asserting that school officials could take immediate action in a "special emergency situation", suggested in Crews v. Clonces. They spelled out when such a "special emergency situation" might arise.

The Court recognizes that exceptions necessarily delimit every rule. In the emotionally charged area of public school policy, a greater-than-usual degree of flexibility is perhaps essential... in times of crisis, where lives and property are seriously threatened, customary constitutional protections may be temporarily curtailed in order

to prevent the destruction of the system which confers those rights. 44

Under this concept, similar to the clear and present danger theory and Tinker's material and substantial test, First Amendment rights of a free press might be curtailed.

Summary

The cases reviewed here point out quite clearly that in addition to the constitutional rights of free speech and expression, the Courts have recognized the extension of the First Amendment right of free press to public school pupils. Basically, subject to relatively minor restrictions noted in the cases reviewed in this chapter, students have the same constitutional rights to a free press as adults and this right can be impinged upon only if the exercise of the right results in a material and substantial disruption of the educational process.

CHAPTER VI
REGULATION OF OFF-CAMPUS SECRET SOCIETIES

Introduction

As seen in Chapter Four, *Tinker v. Des Moines Independent Community School District*, 1969, and subsequent court decisions, mostly by the federal courts, have firmly established that public school pupils are guaranteed the constitutional right of free expression, symbolic or otherwise. If in the exercise of their constitutional right of free expression, students assemble, petition or use the press, as long as it does not materially and substantially disrupt the normal process of education, these three additional First Amendment rights are also protected. There is, however, one area of freedom of assembly, membership in secret societies, fraternities, and sororities, that is now questionable in light of recent decisions by the courts.

As long ago as 1912, the courts in California upheld the suspension of a student for violating a state law designed to prevent the formation and to prohibit the existence of secret, oathbound fraternities in the public schools. On the subject of secret societies in the litigation that challenged the law, the Court said, "It has been said of such societies that they tend to engender an undemocratic spirit

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of caste, to promote cliques, and to foster a contempt for school authority." 2 The reasoning in Bradford that allowed college fraternities and sororities to exist and at the same time disallowed similar organizations in elementary and secondary schools, has been followed in a number of subsequent decisions down to the present time. Acknowledging the difference between college and high school students, the California Court contended that, "Normal schools and colleges are attended by students who are preparing for the serious affairs of life; and being older in years and with wider experience are better fortified to withstand any possible hurtful influence attendant upon membership in secret societies and clubs than the younger pupils attending elementary and secondary schools, who are less experienced and more impressionable." 3

Until the 1960's such cases banning secret societies were not primarily challenged by students alleging violations of their First Amendment right to free assembly. When the issue was raised, the courts dismissed the notion without discussion as being irrelevant. 4 Burkitt v. School District No. 1, Multbinah County, 5 1952, for example said, "As far as the federal constitution is concerned, the validity

2. Ibid.

3. Ibid.


5. 264 P. 2d 566 (1922)
of such state legislation has been authoratively determined..." by the Supreme Court. As late as 1962, a state court dismissed any consideration of the First Amendment for the reason that no debatable constitutional question was involved in secret societies. 7

In 1966, a California law disallowing secret societies in the public schools was challenged by students. 8 Judy Robinson, a member of the "Mañana Club" in a Sacramento high school, sought to have the act declared unconstitutional on the grounds it encroached on her First Amendment right of free assembly. She had been suspended from school because of her membership in the club. The Court, in refusing to declare the act unconstitutional, subscribed to the earlier Bradford decision. The Court judged secret societies to be detrimental and inimical to the best interests of the public schools of the district and to the government, discipline and morale of the pupils. 9

It was alleged by Miss Robinson that the Mañana Club fostered charity, democracy, and literary activities and

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6. Ibid., p. 568.
9. Ibid., p. 782.
was not a secret society. However, the Court, upon an examination of the club, did indeed declare it a secret society since its new candidates were chosen solely upon a secret ballot by the existing members. Similar restraints upon adult citizens, the Court implied, would not be constitutional. The right of adults freely to join together socially and to assemble for lawful purpose may be conceded to include the right to form and maintain clubs, secret or non-secret, the right to be as snobbish as they choose, and any attempt at interference with that right be legislative or administrative mandate may well be said to be arbitrary, unreasonable and therefore in violation of the First Amendment. The Court avoided dealing directly with the issue of free assembly by stating, "The First Amendment guarantee of the right of free assembly as applied to adults (or even to college students, concerning whose rights under the circumstances here involved we express no opinion) is not involved here...." 10

In avoiding the constitutional question of assembly, the Court continued, "Here the school board is not dealing with adults but with adolescents in their formative years....It is dealing under express statutory mandate with activities which reach into the school and which reasonably may be said to interfere with the educational process, with the morale of high school student bodies as a whole and which

10. Ibid., pp. 789-790.
also may reasonably be said not to foster democracy (as the Mañana constitution preaches) but to frustrate democracy (as the Mañana Club by its admitted activities practice)."

As seen in Robinson, the California state court declared a rule prohibiting secret societies for adult citizens would clearly be an abridgement of First Amendment rights. School children, however, would not necessarily be afforded the same constitutional protection as adults since they are in their "formative years" and thus, subject to the discretion of the school boards. The fact that secret societies, even though off-campus, tend to foster undemocratic ideals which might lower the morale of other students was considered by the court reason enough to reject the claim that the students' First Amendment rights were being violated by the state. Incidentally, the Robinson decision has a good review of cases up to 1966 that have upheld state rules prohibiting secret societies.12

The most recent court decision the writer has been able to find wherein students have alleged abridgement of their right to freedom of assembly by the public schools is in Passel v. Fort Worth Independent School District, 1968.13

In the Passel litigation, students sought to enjoin the school's officials from enforcing a rule adopted by the

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11. Ibid., p. 790.
12. Ibid., pp. 788-789.
13. 429 S.S. 2d 917 (1968)
Houston Board of Education in 1966 requiring parents of all students entering a junior or senior high school in September, 1967 to sign a "Supplementary Application for Enrollment" form certifying that the student was not a member and that he or she would not become a member of a high school fraternity, sorority, or secret society. The rule, the students alleged, deprived them of their right to freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The Texas Court, however, rejected the students' contention saying, "...The legislative purpose is not to include any educational organization which has standards or rules by which...it is admitted that the basis for membership is by the secret ballot of the clubs themselves rather than upon rules which any student could qualify." The Court went on to add another dimension to the arguments prohibiting secret societies in public schools declaring that such societies promote invidious discrimination abhorred by the Supreme Court of the United States. In concluding that promoting racial discrimination can be lawfully banned by public school boards, Passel stated, "We think it well within the police power of the State to adopt standards to guide the administration of our public school system and we will not substitute our judgment for that of the Legislature or the School Board.

unless there is some element of willful or intentional discrimination or some real threat of injury to vested property rights."  

School Board Regulations Prohibiting Secret Societies and Recent Court Decisions Granting Students First Amendment Rights

In view of the Tinker decision in 1969 which granted public school pupils First Amendment rights, the legality of regulating off-campus secret societies by school boards appears highly questionable today. Alison M. Grey in an article, "First Amendment Right of Association for High School Student", "The right of association like other First Amendment rights," he stated, "should be restricted only to further a strong state interest, only in the absence of equally effective alternative means of protecting the state interest, and only to the extent necessary to maintain the state interest involved." High school clubs and organizations should thus be evaluated, Grey feels, on these terms.

Tinker offers the material and substantial formula as a pragmatic and legal test to determine when a student's First Amendment rights may be abridged by school authorities. Robinson, for example, showed no evidence of actual disruption or a potential material and substantial disruption to the educational process. Organizations, on the other hand, that

15. Ibid.
foster deliberate, invidious racial discrimination bring in a strong state interest and could be disallowed on the grounds they violate the equal protection clause of the Fourteenth Amendment, as seen in Passel.

*Sullivan v. Houston Independent School District*, discussed in the previous chapter on the press, a post-*Tinker* decision, hinted at what attitude a federal court might take toward the regulation of off-campus societies today. The Court in *Sullivan* stated, "In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education." On the regulation of off-campus activities that might interfere with school discipline, the Court speculated, "Perhaps then administrators should be able to exercise some degree of influence over off-campus conduct. This court considers even this power to be questionable." Court decisions involving the regulation of off-campus expression by school boards also have been held unconstitutional as seen in the previous two chapters.

Marc A. Sheiness in an article in the *Baylor Law Review*, "Fraternities, Sororities, and Secret Societies in Public School", alleges that the Theta Omega Phi sorority in the Houston area has not been disallowed by school officials


18. Ibid., p. 1341.
because the society is not in school, does not bring dis-
credit on the school, and that the members are daughters of
school officials. He points out that inconsistencies exist
in which societies are allowed and not allowed. Sheiness con-
cludes his article by offering the Tinker formula as a more
consistent guide in regulating secret societies. "...[Thus],
the students' right to attend school and his right to par-
ticipate in extracurricular activities should not be denied
him unless, he himself, by his own acts, has acted incor-
rigibly so as to materially and substantially interfere
with the proper maintenance of the school." 20

The Passel litigation over the Houston secret society
did not end in 1968. The higher court in Texas remanded
the judgment back to the district court for further pro-
ceedings on legal technicalities saying, "The case has not
been tried on its merits, and is not ripe for the rendition
of a final judgment." 21 The district court once again ren-
dered an unfavorable judgment against the students seeking
to have the ban on their club exempted from the Houston
School Board's determination that they were a secret society.
In addition to the reasoning offered in the initial Passel
decision it is significant to note that the Court of Civil

19. Marc A. Sheiness, "Fraternities, Sororities, and
XXII, (Summer, 1970), 374.

20. Ibid., p. 378.

21. Passel v. Fort Worth Independent School District,
440 S.W. 2d 61 (1969)
Appeals of Texas in affirming the judgment of the lower court agreed that the activities "substantially and materially disrupted and affected the orderly operation of the school." 22

It appears that the Texas Court saw the necessity of applying the Tinker First Amendment test in rendering the second Passel decision. Even though the students were unsuccessful in their litigation against the Houston School Board, they established the precedent that secret societies would be considered on the basis of the material and substantial test. How influential Passel will be in determining future litigation involving secret societies remains to be seen.

Summary

It is clear today that students are guaranteed all the First Amendment rights by virtue of Tinker and subsequent court decisions reviewed in this study. Most likely, in spite of the second Passel decision, if a student today brought litigation into a federal court seeking to declare regulations prohibiting off-campus, secret societies unconstitutional for breach of free assembly, would be successful. The courts undoubtedly will apply the Tinker material and substantial test as the controlling factor to determine if

the secret society should be allowed. Courts might, as seen in *Passel*, justify regulations prohibiting secret societies that encourage invidious racial discrimination. However, that still leaves questionable the status of non-disruptive off-campus secret societies and its relationship to a public school pupil's right to free assembly.
CHAPTER VII
FOURTH AMENDMENT: SEARCHES AND SEIZURES

Introduction

The Fourth Amendment to the Constitution states that it is, "The right of the people to be secure...against unreasonable searches and seizures." The amendment further requires a search warrant to be issued upon probable cause describing the place to be searched and the persons or things to be seized.

The question of whether or not students are afforded Fourth Amendment protection has been raised thus far in only a few instances. The cases where students have alleged violations of their Fourth Amendment rights are quite similar. In these cases, school officials or law enforcement officers conducted searches and seized materials in public schools without adhering strictly to Fourth Amendment requirements. The seized materials were later placed in evidence during criminal prosecutions of the students involved. The courts in each instance have rejected the students' contention that evidence seized in school should not be admitted due to alleged violations of their Fourth Amendment rights. However, in the few cases that have raised the Fourth Amendment issue the courts have not completely rejected the notion that students in the public schools be afforded some measure of Fourth Amendment protection.

Charles M. Wetterer in his article, "Search and Seizure
in Public Schools," raises a number of questions that exist between a public school and a pupil's relationship to his Fourth Amendment rights. He states, "Suppose the student objects stenuously to the search and protests his innocence and is, indeed, innocent of any wrong doing. In conduct-
in a search, has the administrator violated the student's rights? May a student be later accused of a crime on the basis of evidence uncovered in the search, will such evidence be admitted in court if procured without a search warrant? If an administrator uncovers drugs or other con-
traband, must he call the police? If police arrive a school without a search warrant, must school authorities co-
operate and permit a search? When a student agrees to a search after being ordered to do so by a teacher or prin-
cipal has he waived his right of freedom from unreasonable search?"

Because of the Supreme Court's insistence that states conform to federal constitutional standards, and recent court decisions holding certain types of searches and sei-
sures unconstitutional and judicial recognition of students' constitutional rights, litigation on the questions posed by Mr. Wetterer has resulted.

The massive drug problem prevalent in the public schools makes it necessary for immediate judicial guidelines involving search and seizure. A public school obviously is the most readily available place where masses of young people are in close proximity to one another. The public school therefore affords drug pushers and users a place to conduct their transactions. Parents, police, and school officials in an effort to curb drug use and abuse, see as a major goal the discouragement of harmful drugs on school premises. This, of course, has implications for search and seizures.

Student Suits Raising the Fourth Amendment

The beginning of what turned out to be a lengthy and complex judicial proceeding resulted when three detectives bearing a search warrant directing the search of two high school students, confronted Dr. Adolph Panitz, the vice-principal of Mount Vernon High School in New York. Dr. Panitz summoned the two students to his office and they were searched. After questioning the students at length, Carlos Overton, one of the students who were being questioned, responded with "I guess so" or "Maybe" when asked if he had marijuana in his locker. The detectives, the vice-principal, and a custodian proceeded to open Overton's locker where marijuana cigarettes were discovered. Later

it was determined the search was not legal for the warrant did not authorize the search of Overton's locker. In the litigation that followed, Overton moved to have the evidence suppressed in a youthful offender proceeding.

The case raised a number of important questions relating to Fourth Amendment rights of public school pupils. First, did Overton give his consent to the search? Should he have been advised of his rights? Could his locker be searched without a search warrant? Finally, does a school official have the right to search and seize contraband from a school locker?

The trial judge dismissed Fourth Amendment considerations and ruled that the evidence against Overton could be admitted on the ground that the board of education retained dominion over school lockers through the vice-principal. The Appellate Term later reversed the trial court. However, the Court of Appeals of New York reversed the Appellate decision and allowed the evidence admitted, concluding that Dr. Panitz consented to the search and that such consent was binding on Overton.

The Court of Appeals of New York reasoned, "Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there."\[5\text{[Emphasis supplied]}\]

5. Ibid., p. 25.
The Court further asserted that, "When Dr. Panitz learned of the detectives' suspicion, he was obliged to inspect the locker. This interest, together with the non-exclusive nature of the locker, empowered him to consent to the search by the officers." [Emphasis supplied]

Overton argued that his Fourth Amendment rights were abridged because the vice-principal opened the door of his locker, not because he was exercising a free supervisory control over the locker in the interest of the school program, but because the invalid search warrant compelled him to do so. A petition for certiorari was filed in the Supreme Court and in October, 1968, the highest court granted the writ in a Per Curiam opinion, vacated the judgment and remanded the case for further consideration in light of the recent Bumper decision.

Bumper v. North Carolina, held that where coercion was evident in a search, it would be unconstitutional on the ground it is unreasonable. Isolated on a mile-long dirt road in North Carolina, a sixty-six year old Negro grandmother, when confronted by four law enforcement officers who announced, "I have a search warrant to search your house," said, "Go ahead," and opened the door. A warrant was never shown Mrs. Bumper and in the search that

6. Ibid., p. 25.
8. 391 U.S. 543 (1968)
followed, a .22 caliber rifle instrumental in Bumper's conviction of rape was seized. The Supreme Court, in holding the search to be an unreasonable one, said, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. [If] The situation is instinct with...coercion there cannot be consent."  

By remanding the Overton case back to the New York Court in light of their recent Bumper decision, the Supreme Court was asking the judges to consider the possibility of coercion in the search of Overton's locker. Upon review of the facts in Overton, the Court of Appeals of New York declared there was no evidence of coercion at Mount Vernon High School. They concluded that the desks and lockers were assigned to students for their use, under predetermined conditions, one of which prohibited the storage of materials which violate the law.  

In a case of similar circumstance in California, the courts revived the concept of in loco parentis to authorize a search of a student's locker in a public school. The idea that a school official has control and responsibilities similar to that of a parent while the student is in school has


been eroded by the advent of student constitutional rights. Arnold Taylor, in the *Kentucky Law Journal* declares "*in loco parentis* largely irrelevant." However, in the case, *In Re Donaldson*, 1969, the Court judged the vice-principal stands *in loco parentis* and is not a governmental official subject to Fourth Amendment requirements when conducting a search. Therefore, they viewed, the Fourth Amendment not to be an issue in the case.

A student in Ponderosa High School in Placeville, California approached the vice-principal of the high school and told him a purchase of speed could be easily made in the building. The vice-principal advised the student to make the purchase. Later, after the purchase of the drugs was made, the locker of the student who sold the pills was searched and four-and-one-half packs of marijuana and a plastic bag containing marijuana was seized. Fifteen year old Donaldson sought to have the evidence in court against him suppressed on the grounds the search and seizure was unreasonable and in violation of his Fourth and Fourteenth Amendment rights in a criminal proceeding.

The Court was not in sympathy with Donaldson saying in part, "We find the vice-principal of the high school not to

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12. 75 Cal. Rptr. 220 (1969)
be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures. Such school official is one of the school authorities with an obligation to maintain discipline in the interest of a proper and orderly school operation, and the primary purpose of the school official's search was not to obtain convictions, but to secure evidence of student misconduct. That evidence of a crime is uncovered and prosecution results there from should not of insel make the search and seizure unreasonable." 13

It would appear here in Donaldson the Court is stretching the point when it considers the search of a known drug pusher's locker in a school to be only for evidence of breach of school rules. Obviously, the vice-principal, in this case, acting in the best interest of the school, fully intended to have the pusher arrested. The Court concluded in Donaldson by saying, "...Principals and teachers are directed to exercise careful supervision over the moral conditions in their respective schools, the use of narcotics is not to be tolerated, and students are required to comply with the regulations and submit to the authority of the teachers." 14

The Court in effect in the Donaldson decision viewed

13. Ibid., p. 222.

the Fourth Amendment inapplicable to public school officials subject to the restrictions of the Fourth Amendment. This view, however, as mentioned, is impractical for in the event of a search, evidence seized, if admissible in a court of law could lead to the conviction of serious crimes. The California Court further saw no reason why the school officials could not search the lockers from time to time without a warrant if they suspected something illegal to be there. Other courts have not taken the same view of searches and seizures as the California Court.

In a Kansas case 15 not involving drugs, Madison Stein, a high school student, was charged and convicted of second degree burglary and grand larceny. A motion to suppress the evidence used to convict him was made alleging the search and seizure conducted in his high school violated his Fourth Amendment rights. The facts of the case are these: On January, 1968, a music store was robbed and the next day two police officers visited the principal of Stein's school. With Stein's consent and in his presence, his locker was searched and a key to a bus depot locker was found there. The bus depot locker, the key to which was found in Stein's locker, turned out to contain the goods stolen from the music store. The Court turned down Stein's contention that the search in school was illegal, and also ruled that there was

no coercion involved. The Court further concluded that Stein did not need to be informed of his rights since he consented to the search.

The argument that Stein's Fourth Amendment rights were not impinged upon because of the nature of a high school locker was upheld as the Court stated, "...It does not possess all the attributes of a dwelling, a motor vehicle, or a private locker....The possessor's right of possession is exclusive; it is protected from unwarranted intrusion as against the world. The principal of Ottawa High School testified that he has custody and control of, and access to, all lockers at the school; that he has a master list of all combinations to all combination padlocks, and a key which will open every locker. He testified also that he opened Stein's locker on his own judgment." 16

Concerning the nature of high school lockers, the Kansas Court said, "Although a student may have control of his school locker as against the school and its officials, a school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in

16. Ibid., p. 3.
school administrators and that the same must be retained
and exercised in the management of our schools if their ed-
ucational functions are to be maintained and the welfare of
the student bodies preserved.\textsuperscript{17}

Overton, Donaldson, and Stein all essentially agree on
one basic premise—that school officials have the right, if
not the duty, to search school lockers upon probable cause
that something illegal might be there and the searches do
not infringe on a student's Fourth Amendment rights.

Can a school official search a student off the school
grounds without violating his Fourth Amendment right to be
secure from an unreasonable search? The courts in New York
ruled that a school official could conduct a search and sei-
zure three blocks from the school in People v. Jackson,\textsuperscript{18} 1971.
The Coordinator of Discipline went to a classroom and asked
Andre Jackson to follow him to his office. On the way the
school official noticed a bulge in Jackson's pants pocket.
Upon arriving at the office, Jackson bolted out the door
and down the street. Three blocks from the school the Co-
ordinator of Discipline caught the student who had his hand
inside his pocket. As the Coordinator of Discipline held
his wrist, he ordered Jackson to give the contents to him.
The bulge turned out to be a set of narcotics "works",

\begin{footnotes}
  \item[17] Ibid.
  \item[18] 319 N.Y.S. 2d 731 (1971)
\end{footnotes}
syringe, eyedropper, needle, etc. The "works" were turned over to a police officer who was also pursuing Jackson at the request of the school administrator.

In the litigation that followed, a lower New York court suppressed the evidence on the grounds that the Coordinator of Discipline, as a government official, had searched Jackson without probable cause in violation of his constitutional rights. The Appeals Court however, reversed the judgment citing the idea that the school officer was acting in loco parentis. The Court said, "A school official, standing in loco parentis to the children entrusted to his care, has, inter alia, the long honored obligation to protect them while in his charge, so far as possible, from harmful and dangerous influences, which certainly encompasses the bringing to school by one of them of narcotics and 'works' whether for sale to other students or for administering such to himself or other students." 19 The reasoning followed pretty much that used by the courts in Overton and Donaldson as the New York Court stated, "IIt would not be unreasonable and unwarranted that he [the Coordinator of Discipline] be permitted to search the person of a student where the school official has reasonable suspicion that narcotics may be found on the person of his juvenile charge. Such action, of an investigatory nature, would and should be expected of him. Being justified, he would still be performing this important fun-

19. Ibid., p. 733.
ction, though three blocks from school, necessitated by the flight of this errant boy. As I view the incident, the Coordinator's function and responsibility went with him during the chase that took him and the boy away from the school." 20

The Court thus allowed the Coordinator, who was in "hot pursuit" of the student to conduct the search three blocks from the school building.

Jackson also raised the point that he was coerced by the school official in the search of his person, prohibited by Bumper. This contention was dismissed also on the premise that since the school official was acting in loco parentis the force he applied was legal. The Court said of the coercion issue:

A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use physical force, but not deadly force, upon such minor or incompetent person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such minor or incompetent person.21

A lengthy, but important conclusion offered by the Court in Jackson illustrates the genuine concern of the courts over the problem of searches and seizures in schools.

As noted, the rigid standard, probable cause, may not be imposed upon a school official if he is expected to act effectively in loco parentis.

20. Ibid., p. 733-734.

21. Ibid.
While we are far advanced from the days of the Little Red Schoolhouse, such advancement has also brought great ills. Rampant crime and drug abuse threaten our schools and the youngsters exposed to such ills. Much could be written about the ponderous problems that beset parents and school authorities in their efforts to prevent and stave off the conditions all about us. We are well aware of the gravity of these conditions. There is no need for enlargement. In consequence, greater responsibility has fallen upon those charged with the well-being and discipline of these children. What they may do in that regard should be weighted, on balance, with the full appreciation of their duties and the nature of that greater responsibility. Only then can reasonableness be concluded in the context of the prevailing circumstances relating to the Fourth Amendment. Reasonable restraint is imposed, less what the school officials do shall take the form of authoritarian behavior, trammeling the rights of the students entrusted to them. Toward that end, a basis founded least upon reasonable grounds for suspecting that something unlawful is being committed or about to be committed shall prevail before justifying a search of a student when the school official is acting in loco parentis. 22

An important point to consider in this study of student constitutional rights is the fact that the lower New York Court held in favor of the student of the grounds his Fourth Amendment rights were violated by the search of a school official. Even in reversing the lower court, the Appeals Court in New York implied that a student does have the constitutional right to be secure from unreasonable search and seizure by stating, "What the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.

22. Ibid., p. 736.
Each search must be determined in its own setting."²³ Finally, in Jackson, the Court did suggest that a school official could not stop a student on the street at any time and conduct a search which does to a degree grant a measure of protection to students against unreasonable searches.

Summary

Students in the public schools today have yet to be accorded the full constitutional protection found in the Fourth Amendment. Mainly because of the drug problem the courts have granted school officials wide discretion to conduct searches of students and their lockers by reviving the eroding *in loco parentis* doctrine. A school official acting in place of the parent may, upon probable cause, legally search a student or his locker. The courts point out that the Constitution does not say a person shall be free from any search but an unreasonable search. In the few decisions to date the courts have stated that searches by other students or a random search by a school official on the street would be unreasonable and therefore unconstitutional. Otherwise, the provisions in the Fourth Amendment that are mandatory in adult searches and seizures, the courts have held, are not applicable in a public school.

²³ Ibid., p. 733.
CHAPTER VIII
PROCEDURAL DUE PROCESS

Introduction

The Fifth Amendment states:

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, not be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment states:

In the criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

There are two kinds of due process in constitutional law today, substantive and procedural. Substantive due process consists of a judicial review of the substance of a state or federal act to determine if an individual has been deprived of life, liberty, or property without due process of law. The expansion of substantive due process mentioned in Chapter Two came about through a broader interpretation of the due process clause of the Fourteenth Amendment.
beginning in the late Nineteenth Century.

Procedural due process is found in the Fifth and Sixth Amendments and is designed to prohibit the government from limiting in any way the individual's personal or property rights without following certain procedures. As shown in Chapter Two, through a number of significant court decisions, the procedures found in the Fifth and Sixth Amendments have come to cover actions by the states.

Nowhere has the expansion of constitutional protection to public school pupils been more important than in the area of procedural due process. In a number of recent decisions relating to the suspension and expulsion of students, the courts have determined that many of the procedural requirements set forth in the Fifth and Sixth Amendments are now binding on school officials. Students at the present time are not accorded the full guarantees found in the Fifth and Sixth Amendments. However, the courts have stated that school officials must follow certain procedures before expelling or suspending students in order to guarantee them fundamental fairness. This chapter will show to what extent procedural due process has been granted to public school pupils by the courts.

As a result of the Supreme Court's emphasis on the importance of education in Brown v. Board of Education of Topeka,1 1954, education came to be considered by the courts

1. 347 U.S. 483 (1954)
as a "right" of American children. In Brown, Chief Justice Warren said,

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Courts thereafter began to examine public school suspensions in light of procedural due process requirements. Practically speaking, the threat of permanent expulsion from a high school today could ultimately be more serious to an adolescent than many sentences imposed by the courts in criminal cases.

A most significant landmark decision that led to the granting of procedural due process to public school pupils was In Re Gault. Gault, previously mentioned in Chapter Three of this study, had a significant impact on student rights in general, but more importantly because the decision "incorporated" parts of the Fifth and Sixth Amendments to include protection for juveniles. Following the precedent in Gault, these procedures have since been expanded to public school pupils in subsequent litigation. Gerald Gault, a minor involved in a juvenile proceeding, was ordered con-

2. Ibid., p. 493.
fined to a state industrial school for a period of six years without a notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript of the proceedings and the right to appellate review. ³

The Supreme Court saw in the juvenile proceeding a denial to Gerald Gault of fundamental fairness and due process of law. Since the consequences of the juvenile proceeding were so severe, six years of incarceration, Gault, even though he was 15 years old, should have been guaranteed the rudiments of procedural due process. Regarding the Sixth Amendment requirement that the accused be informed of the nature and cause of the accusation, the Supreme Court in *Gault* said, "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded and it must set forth the misconduct with particularity." ⁴

On the right to counsel, the highest court contended that, "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with the problems of law." ⁵

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³ 387 U.S. 1 (1967)

⁴ Ibid., p. 33.

⁵ Ibid., p. 36.
added other rights for juveniles. In the words of the Court, "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment is unequivocal and without exception."\(^6\)

Because of the serious consequences in the juvenile proceeding against Gault, procedural due process was deemed necessary. The same reasoning, previously mentioned, is being applied in litigation arising out of public school suspensions and expulsions—that the seriousness of an expulsion warrants some measure of procedural due process to protect public school pupils.

**Procedural Due Process and College Students**

In a number of instances, court decisions relating to constitutional rights of college students helped pave the way for later expansion of these same rights to public school pupils. The expansion of procedural due process rights to students in the secondary level is no exception.

A 1943 case\(^7\) raised the due process issue when students from the University of Tennessee were expelled for selling final examinations. The plaintiffs sought judicial intervention because they were not confronted by or informed of the witnesses against them. The Tennessee Court rejected

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7. *State v. Hyman*, 171 S.W. 2d 822 (1943)
the students' contention saying, "The due process clause of the Constitution...can have no application where the governing board of a school is rightfully exercising its inherent authority to discipline students."\(^8\)

Two decades later, however, a Federal Circuit in Alabama made the concept of due process applicable to college student suspensions in *Dixon v. Alabama State Board of Education*,\(^9\) 1961. Six Negro students in the *Dixon* litigation were summarily expelled from an Alabama State college for participating in a civil rights demonstration without the consent of the college president. Formal charges were not placed against the students nor were they granted a hearing prior to their expulsions. In this landmark decision, the Court saw the problem as, "Whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct. We answer that question in the affirmative."\(^10\) The Court continued, "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."\(^11\) With this pronouncement, college students were afforded constitutional protection of due process in the Fifth and Sixth Amendments.

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9. 294 F. 2d 150 (1961)
The almost unlimited authority of school officials over college students regarding expulsions was thus ended with Dixon. The fundamental principles of fairness would now require notice and a right to be heard in college expulsions.

Realizing the far-reaching implications of their decision, the Court said, "We are confident...[That due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct." The Circuit Court went on to offer some important guidelines for college administrators to follow that would insure students faced with the possibility of expulsion the rudimentary elements of fair play. "They should...comply with the following standards. The notice should contain a statement of the specific charges and grounds...and an opportunity to hear both sides." The Court finally pointed out that all of the procedural safeguards in the Fifth and Sixth Amendments are not accorded students as they stated, "This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required." Dixon is mentioned

12. Ibid., p. 158.
13. Ibid.

here because recent court decisions on secondary student expulsions refer to the guidelines offered in this important case.

When considering Brown, Gault and Dixon, the judicial precedents were therefore available in the late 1960's that led the courts to proclaim that certain aspects of procedural due process should be afforded public school pupils. What specifically the courts have decided are procedural rights of students will be considered next.

The Right to Counsel

**Madera v. Board of Education of City of New York**,\(^{15}\) raised the issue of the right to counsel in a public school pupil's guidance conference. After more than a year of continuous behavioral problems, Victor Madera was suspended from the seventh grade. Victor's parents were notified of the suspension and were requested to be present in a Guidance Conference fifteen days later, with regard to their son's suspension. The parents sought to have an attorney present at the Guidance Conference. However, the school officials denied the request citing a school board rule that provided: "Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally for the benefit of the child, attorneys seeking

\(^{15}\) 386 F. 2d 778 (1967)
to represent the parent or child may not participate."

The Maderas successfully obtained a temporary restraining order from a district court which would allow them representation by counsel. However, the Second Circuit Court of Appeals reversed the decision on the grounds that the consequences of the Guidance Conference were not serious enough to warrant representation by counsel in order to protect Victor Madera's interests. The Court pointed out that the most that could happen to a student after a Guidance Conference would be to have him transferred to another class or school. He could, but only with parental permission, have been transferred to a school for the socially maladjusted. The District Superintendent after the Guidance Conference also could have referred the student's case to the Bureau of Child Guidance, another social agency, or the Bureau of Attendance for court action. In any case, these agencies would afford Victor procedural due process when dealing with him.

The Court said, "At the most, the Guidance Conference is a very preliminary investigation, if it can be considered an investigation at all. After the conference, aside from a school reassignment, if any, a whole series of further investigations, hearings and decisions must occur before the child is subjected to any of the serious consequ-

16. Ibid., p. 780.
ences which the district court suggested follow for the juvenile involved in a District Superintendent's Guidance Conference."

There was, however, another important point considered by the Court in Madera— if a student was not allowed counsel at a Guidance Conference should he still be afforded the protection of due process? On this question, the Court answered in the affirmative saying, "The right to representation by counsel is not an essential ingredient to a fair hearing in all types of proceedings." Thus, the importance of Madera is twofold. First, even though the student did not gain the right to counsel in a "guidance conference", the Court did recognize the Gault reasoning that counsel would be guaranteed if the outcome of a school hearing could have serious consequences for a student and that in any type of hearing involving a student, he should be accorded fairness. Secondly, the Court recognized the necessity to limit the use of counsel for very pragmatic reasons stating, "Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspension, into criminal adversary proceedings—which they are not."  

17. Ibid., p. 785.
18. Ibid., p. 786.
Cosme v. Board of Education of City of New York, 20 1968, followed pretty much the reasoning in Madera by upholding the Board of Education’s refusal to permit a student’s parents to be represented by counsel at a conference called to discuss the student’s temporary suspension from school because of misconduct. Permanent exclusion from school however would allow the assistance of counsel.

Notice and Hearing

A year after Madera, in still another New York case, the state courts expanded the concept of procedural due process to a controversy involving the State Regents Examinations. Goldwin v. Allen, 21 resulted when Marsha Goldwin was accused of cheating on the New York State Regents Examination by the Acting Principal of her high school. She broke down and confessed to cheating when confronted with the evidence against her. The next day Marsha recanted her confession but the Acting Principal reported to the State Regents anyway that she had cheated on the examination. The Regents, acting on the letter, suspended Marsha’s privileges related to the examination. Marsha brought suit claiming she was denied her constitutional rights because the action against her was taken without a hearing.

The Court found in favor of Marsha because the suspension


21. 281 N.Y.S. 2d 899 (1968)
of her examination privileges was certainly serious for a student in the New York public schools. She would have problems being admitted to a college, she would be ineligible for a scholarship and would not receive a state diploma. Without a diploma Marsh's future job prospects would also be questionable. The Court also commented on Marsha's "confession".

It is not the intention of the court to set out guidelines pursuant to which school authorities may interview a student with regard to cheating and under no circumstances does the court believe that the rules defined in Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, apply here. However, it has been held that one involved in an administrative proceeding may not be deprived of rights under the Fifth Amendment to the Federal Constitution. [Citations omitted] This court questions the efficacy of the statements elicited from infant petitioner's initial explanation was intended to disprove that statement, which the school authorities found not credible.

The Court pointed out that a student is not afforded all the judicial proceedings mandatory in a criminal case. However, the New York Court questioned the fairness of using Marsha's "confession" as the sole basis for the action taken against her. The Court, in fact, reminded school officials they did not want to interfere in school affairs, but if students were not accorded fundamental fairness when the consequences of administrative action are serious, the courts would intervene.

22. Ibid., pp. 905-906.
Two cases where the plaintiffs alleged violations of First Amendment right in 1969, also raised the question of a denial of procedural due process rights. In both **Sullivan v. Houston Independent School District**,\(^{23}\) and **Vought v. Van Buren Public Schools**,\(^{24}\) students were successful in their claim that school officials had violated their procedural due process rights. The Federal District Court in **Vought** said that suspended students must be afforded procedural due process provided in **Dixon**. Therefore, he should have been given a statement of charges, a hearing, confronted by the witnesses against him and an opportunity to present his own defense\(^{25}\) before the school officials expelled him for possessing obscene materials.

A Federal Court in **Sullivan** spelled out standards of procedural due process a school board must follow before it could suspend students involved in an underground newspaper. The Court said the requirements were:

1. A formal written notice of charges and of the evidence against him must be provided to the student and his parents or guardian.

2. A formal hearing affording both sides ample opportunity to present their case by way of witnesses or other evidence.

3. Imposition of sanctions only on the basis of

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25. Ibid., p. 1393.
substantial evidence. 26

Hobson v. Bailey, 27 1970, is an example of gross abuse of fairness by school officials in the expulsion of a student. Deborah Lynn Cleves, seventeen, was excluded from her high school in Tennessee after participating in a civil rights demonstration. Initially she was suspended for three days for cutting class and leaving school without permission while demonstrating in Memphis in support of a local Black labor union's efforts to win recognition. In a protest over her three day suspension, Deborah picketed her school the next day. As a result, she was given a Board Suspension for picketing in front of the school and inciting students not to enter the building. After a conference involving the Assistant Superintendent, Deborah, and her mother, Deborah was expelled for the remainder of the year. At this point Deborah thought she had no further recourse and began picketing the school again where she was subsequently arrested. A Juvenile Court Probation Officer told Deborah during her arrest that if she would sign a form admitting to the offense of disorderly conduct, of which she was not guilty anyway, she would be allowed to go back to school. Deborah willingly signed the form and later appeared back at school. This time the school denied her readmission citing also the reason that she admitted-


ly was disorderly in a demonstration outside the school. Deborah then sought counsel. Her attorneys were later advised she could go to a different school in the city. She attended the new school. However, after a short time Deborah sought readmission into her former school resulting in the litigation.

Deborah claimed the school officials had violated her due process and equal protection rights of the Fourteenth Amendment. The Federal Court, recognizing the obvious abuses of due process in the case, ordered Deborah back to her original school. They said the school officials had not given her a hearing, had suspended her without prior notice, had obtained inaccurate information, had not informed her she could appeal and had not substantiated the charges against her.28

A federal court in Illinois added a fourth procedural requirement, a fair and impartial decision, in Whitfield v. Simpson.29 Marquitta Whitfield was expelled by a school board for one year for gross disobedience and misconduct. The Court upheld the expulsion and pointed out what procedures should be made available to public school pupils by stating, "The test of whether or not one has been afforded procedural due process is one of fundamental fairness in the light of the total circumstances. No particular method of

28. Ibid., p. 1401.

procedure is required for due process, but what is required is: (1) Adequate notice of the charges; (2) Reasonable opportunity to prepare for and meet them; (3) An orderly hearing adopted to the nature of the case; and (4) A fair and impartial decision." 30 The Court here in Whitfield is not prescribing any one particular formula for procedural due process but does say that the four essentials just mentioned are necessary to insure fairness.

One of the most important decisions thus far adjudicated on student procedural due process rights is the recent Williams v. Dade County School Board, 31 1971. Other Federal Courts have in the last few years ruled that various aspects of Dixon should apply to public school pupils. Williams v. Dade County School Board, 1971, decided by a Federal Court, made the Dixon procedural safeguards applicable to public school students. The litigation grew out of a challenge to Regulation 5114 of the Dade County, Florida Board of Education which allowed the superintendent of schools to give a thirty-day suspension to school pupils in addition to a principal's ten-day suspension without benefit of hearing.

Tyrone Williams, a senior at Miami Killian Senior High School, was charged with participating in a mob attack. He was given a ten-day suspension by his principal and later the

30. Ibid., p.894.
31. 441 F. 2d 299 (1971)
superintendent imposed an additional thirty day suspension on the student. Williams alleged his procedural due process rights were violated by the lengthy suspension because he was not afforded a hearing.

In *Williams* the Court made *Dixon* applicable to public school long-term suspensions by saying, "Though *Dixon* dealt with the expulsion of college students, we feel that to deprive even a high school student, 'in these days', of 40 school days may indeed cause serious harm...we see no reason why these *Dixon* procedural safeguards ought not be required before adding an additional 30-days."\(^{32}\)

These decisions clearly demonstrate that students in the public schools today facing possible long-term suspensions or expulsion do have the constitutional right to written notice of the charges and a hearing.

**Confrontation**

The Sixth Amendment right to confront the witness against the accused became a right of public school pupils in a recent New Jersey decision, *Tibbs v. Board of Education of Township of Franklin*.\(^{33}\) In the Tibbs decision, Tanya Tibbs was accused by others, not identified, of physically assaulting another student. Due to the fear of possible

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33. 276 A. 2d 165 (1971)
recriminations the board of education, in the subsequent hearing, withheld the names of those making the accusation against Tanya. The board suspended Tanya and the New Jersey Commissioner of Education affirmed the suspension. The decision was then taken to the New Jersey Courts where it was overturned.

The New Jersey Superior Court would not accept the argument that presenting the witnesses against the accused in the school board hearing would be too dangerous. The Court went on to add, "I therefore conclude that in the context of such a case as this not only should the accusing witnesses be identified in advance but also, as a general matter and absent the most compelling circumstances bespeaking a different course, be produced to testify and to be cross-examined." 34

The Length of Suspensions and Procedural Due Process

A number of decisions in this chapter demonstrate that certain procedural safeguards are guaranteed to students facing expulsion from school. Suspensions however, particularly short-term suspensions, pose a different legal problem. Should a student be afforded procedural safeguards if he is facing a one or two week suspension? Recent court decisions have dealt specifically with this problem. Conflicting decisions however, have made the guidelines unclear.

34. Ibid., p. 170.
A Federal Court in *Baker v. Downey City Board of Education*, 35 1970, already mentioned in connection with First Amendment rights, pointed out that, "Due process is not a fixed, inflexible procedure which must be accorded in every situation." 36 The Federal District Court in California went on to say, regarding a ten day suspension, that "... if the temporary suspension of a high school student could not be accomplished without first preparing specifications of charges, giving notice of hearing, and holding a hearing, or any combination of these procedures, the discipline and ordered conduct of the educational program and the moral atmosphere required by good educational standards, would be difficult to maintain." 37

Later in the same year a ten-day suspension without a hearing was allowed by a Federal District Court in Florida. *Banks v. Board of Public Instruction of Dade County*, 38 1970, upheld a Florida statute which permitted principals to suspend students for ten days without affording prior notice or a hearing. The Court said the right to a hearing is subject to limitations imposed in order to insure the orderly admini-

36. Ibid., p. 522.
37. Ibid., pp. 522-523.
stration of education. In order to remove a disruptive student immediately, in some cases, the teacher would have to leave the classroom for the hearing. If a teacher could not remove a disruptive student immediately, all would suffer. In Banks the Court contended, "Public school children suspended for misconduct are not criminals. The legal processes due them are less exacting than that due one who is accused under a criminal statute." The Court rejected the Dixon requirements pointing out that a college suspension is far more serious than a public school suspension. Therefore, a ten-day suspension without hearing did not, in the view of this Court, impinge upon a student's right to due process.

A Federal Circuit Court of Appeals in 1971 also upheld a ten-day suspension of a student in Connecticut without a hearing. Molly Farrell, a high school sophomore in Clinton, Connecticut, was suspended for ten days after being involved in a "sit-down" protest. She alleged her suspension denied her procedural due process because there was no written notice, hearing, or the confrontation of witnesses against her. Molly was, however, well aware of a rule that automatically allowed a ten-day suspension of students who disrupted the school. The school board first authorized a fifteen day sus-

39. Ibid., p. 291.
40. Ibid., p. 292.
41. Farrell v. Joel, 437 F. 2d 160 (1971)
pension then lowered it to the proper ten-day limit, but upheld the suspension stating, "...Appelants' actions were clearly improper and prompt discipline of some sort was justified." The Federal Circuit Court went on to reason that, "...In cases of minor discipline particularly, parent, student, and administrator should remember that substitution of common sense for zealous adherence to legal positions is not absolutely prohibited."^43

A more recent Federal Court ruling was made regarding another ten-day suspension in Florida. In 1968, the school board in Fort Myers, Florida adopted a policy that automatically suspended students for participating in demonstrations and walkouts at school. Later, in February, 1970, one-hundred Black students walked out of school to voice their grievances over school policies. The group was orderly and well behaved. They were subsequently suspended by the principal for ten days.

In this particular instance the Federal Court saw a denial of due process in the suspensions even though they were temporary. The Court declared, "The nature of the walkout—whether it was non-violent or tumultuous—is irrelevant to the due process issue, although it would be relevant to the First Amendment issue. Whether the students walked out peaceable or riotously, they were still entitled by due

42. Ibid., p. 163.
43. Ibid., pp. 163-164
process to a hearing. Due process protects the orderly and disorderly, even as it protects the innocent and the guilty. The Court also took the position that, "Due process requires that an accused be offered an opportunity to have his guilt determined by a fair hearing prior to the imposition of penalties for the alleged misconduct." Further, the Court concluded in the decision "...[T]hat due process prevents defendants from suspending a student for a substantial period of time without first affording the student an adversary hearing. A suspension for ten days is a suspension for a substantial period of time." Evidently in this situation, the courts saw the necessity for a hearing regarding the suspension of a student for ten days because of involvement in a First Amendment question. Automatic suspension for ten days in the exercise of expressing an opinion could here have a "chilling effect" on a student's First Amendment rights.

Williams v. Dade County School Board, already mentioned previously in this chapter, upheld a ten-day school suspension that did not provide for a hearing. However, the Court would not allow the superintendent of schools to impose an additional thirty-day school suspension without procedural

45. Ibid., pp. 1214-1215.
46. Ibid., p. 1215.
47. Ibid., p. 1216.
48. 441 F. 2d 299 (1971)
due process safeguards. The Appeals Court upheld the principal's right to impose a ten school day suspension because it realized the need in a public school situation for the administration to act quickly in some cases to prevent further serious disorders. To deny a student the right to a hearing for an additional thirty days, however, was to deny a student fairness. The Court said of the additional suspension,

We feel we must state, at the outset, that we are not dealing with the power of the school to discipline its students. Nor are we concerned with the guilt or innocence of appellant. We focus only on the school's procedure for the disposition of the case. Further, we note that though the record indicates there may have been considerable disruption in the school at the time appellant was first suspended (for ten days), we are concerned with the imposition of the additional 30 day suspension which was given without benefit of an effective hearing and at a later time.49 [Emphasis supplied]

The Court continued by pointing out that the suspension, an eight week loss of school time, was a serious penalty for a public school pupil today.

We realize, of course, that it is not necessary that students be given the kinds of procedural protections reserved for those accused of serious crime. Nevertheless, we feel that a penalty of this magnitude ought not be imposed without proper notice of the charges, and at least an attempt to ascertain accurately the facts involved and to give the student an opportunity to present his side of the case.50

At the present time it is not clear whether students should be afforded procedural due process in suspensions that

49. Ibid., p. 301.
50. Ibid., pp. 301-302.
do not exceed ten days. The Williams decision does make it clear that suspensions of students for thirty school days without notice and a hearing violates a student's constitutional rights.

Summary

Public school pupils today, through the extension of procedural due process to them, have considerable constitutional protection when facing possible long-term suspensions and expulsions. Since the denial to an adolescent of the opportunity to attend school is viewed in a very serious light by the courts, certain constitutional safeguards have been deemed necessary to protect the student's interest. Although the courts have not included all the Fifth and Sixth Amendment procedural due process requirements, the courts have stated that many aspects of these two amendments are student constitutional rights. The courts have held that students facing long-term suspensions or expulsions shall be allowed:

1. Counsel
2. Formal written notice of the charges.
3. A formal hearing.
4. Adequate time for both sides to prepare.
5. To be confronted by the witnesses against him.
6. The right to cross-examine witnesses.
7. A fair and impartial decision.

These safeguards listed above have been determined by the courts to be student constitutional rights. They offer public
school pupils today substantial protection that was practically nonexistent only a few years ago.
CHAPTER IX

STUDENT RIGHTS UNDER THE EIGHTH, NINTH, AND TENTH AMENDMENTS

Cruel and Unusual Punishment

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Students in two 1971 cases alleged that school officials inflicted cruel and unusual punishment upon them thereby violating their Eighth Amendment rights.

In Ware v. Estes, a high school student sought to restrain the Dallas Independent School District from administering corporal punishment without the permission of the student or parent. The school system provided for corporal punishment through a rule that stated:

Principals are authorized to administer and reasonable punishment, including detention, corporal punishment, suspension for a period not to exceed ten school days at a time, or recommendation for expulsion from school.

The students alleged that the rule in question violated the Eighth Amendment by allowing the infliction of cruel and unusual punishment of students. The students also asserted that the rule had been abused by Dallas school officials in the past. The Federal District Court hearing the case, how-

1. 328 F. Supp. 657 (1971)
2. Ibid., p. 658.
ever, rejected the students' contention by pointing out that even if the policy was abused in Dallas it did not mean the policy was unconstitutional.3

Corporal punishment, as it was being administered in Dallas, meant that a student would be hit on the buttocks with a wooden paddle. The Court avoided the issue of the value of corporal punishment in the educational process stating that it was not within the Court's competence or function to pass on the merits of corporal punishment.4 The District Court concluded in Ware that a student is adequately protected because if the punishment is unreasonable or excessive, the perpetrator will be criminally and civilly liable.5 "The law and policy," said the Court, "do not sanction child abuse."6

A case previously reviewed in conjunction with First Amendment rights also raised the question of cruel and unusual punishment. Press v. Pasadena Independent School District,7 1971, sought to have an eighth grade girl readmitted to school after she had been suspended for participating in a disruptive demonstration. She alleged her suspension for the remainder of the spring term was cruel

3. Ibid.
4. Ibid., p. 659.
5. Ibid., p. 660.
6. Ibid.
and unusual punishment and therefore violated the Eighth Amendment.

The Federal District Court in California hearing the case rejected the student's argument and held that the Eighth Amendment only applied to criminals. In the words of the Court, "As plaintiff has not been the subject of any criminal sanction, and has not been abused, tortured, or otherwise brutalized, she is clearly not within the... [Eighth] Amendment." The application of the Eighth Amendment to public school pupils was therefore rejected by the Court in Press.

The Eighth Amendment has also been raised in a number of "long hair" cases. Students seeking the removal of school rules requiring them to cut their hair have alleged the rules promulgate cruel and unusual punishment. Thus far, the courts have refused to recognize the cutting of a student's hair to be cruel and unusual punishment subject to the protection of the Constitution.

Efforts by students to have the constitutional protection of the Eighth Amendment extended to them have to this day not been successful. Courts have taken a position that the Eighth Amendment only applies to criminals. They further view corporal punishment in schools to be legal and if abused by school officials, state criminal and civil statutes are available for remedies.

8. Ibid., p. 564.
Rights Reserved to the People

The Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people", and the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", have both been raised in connection only with "long hair" cases. The central point in these cases is the contention that a student's right to wear his hair long is an individual right not subject to regulation by any government. It is a right, students allege, that is "reserved to the people". Students cite as a controlling precedent, Griswold v. Connecticut, and its "penumbra doctrine". The "penumbra doctrine", mentioned earlier in this study, established "zones of privacy" in the Bill of Rights that are guaranteed constitutional protection. Students seeking the right to wear long hair in the public schools claim a "zone of privacy" extends to their grooming preferences. Until very recently the courts have rejected the application of the Ninth Amendment as a Griswold right in "long hair" controversies stating that Griswold was limited to the privacy between husband and wife in the home.\textsuperscript{9} Griswold, held

\textsuperscript{9} 381 U.S. 479 (1965)

\textsuperscript{10} King v. Saddleback Junior College, 445 F. 2d 932 (1971)
unconstitutional a Connecticut statute that made the use of birth control devices illegal.

However, the Eighth Circuit Court of Appeals in a "long hair" case just decided, reversed Bishop v. Colaw, 318 F. Supp. 445 (1970), on the grounds that a public school pupil did possess a constitutional right to govern his appearance under the Ninth Amendment. The Court stated:

"...Some have referred to the right to govern appearance as 'fundamental' others as 'substantial', others as 'basic', and still others as simply as a 'right'. The source of this right has been found within the Ninth Amendment, the Due Process Clause of the Fourteenth Amendment and the privacy penumbra of the Bill of Rights. A close reading of these cases reveals, however, that the differences are more semantic than real. The common theme underlying decisions striking down hair style regulations is that the Constitution guarantees rights other than those specifically enumerated and that the right to govern one's personal appearance is one of those guaranteed rights."

The Bishop decision, rendered in 1971, extends Ninth Amendment protection to public school pupils. The Court felt school regulations governing personal appearance transcended a right to privacy guaranteed by the Ninth Amendment. The implications of this decision are yet to be seen since it is so recent. The following chapter in this study will show that other Federal Circuit Courts of Appeal have rejected the reasoning the Eighth Circuit Court followed

11. 450 F. 2d 1069 (1971)

12. Ibid., p. 1075.
in deciding Bishop. In any case, Bishop should not have too much influence on the broad perspective of student constitutional rights since it was adjudicated on a narrow issue, the right of students to wear long hair. While the protection of the Ninth Amendment has been granted to students in at least one instance, as seen in Bishop, the Tenth Amendment, raised by students only in conjunction with "long hair" controversies, has up to now been rejected by the courts.
CHAPTER X
"LONG-HAIR" AND PUBLIC SCHOOL PUPILS

Introduction

So voluminous are court cases involving "long hair" in the public schools, the topic warrants a separate chapter in this study of student constitutional rights. This study has reviewed no less than seventy-five court decisions on long hair which far out number all other suits in which students have sought constitutional relief through the due process clause of the Fourteenth Amendment. The cases are so numerous that only appellate decisions will be reviewed here. The inability of the courts to provide a clear and consistent ruling on the status of "long hair" applicable on a nationwide scale has generated a controversy far in excess of its importance. The cases, by and large, seek to prevent school officials from suspending students who choose to wear their hair long in violation of adopted dress codes. On occasion, students have alleged in court that rules prohibiting "long hair" in the public schools violate constitutional rights in as many as the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments.¹

Some courts² have rejected the whole controversy as a

2. Freeman v. Flake, 448 F. 2d 258 (1971)
constitutional issue viewing the problem as one that should be left strictly for school administrators to resolve. Other courts,\(^3\) realizing the importance of "long hair" to public school pupils, have conscientiously sought to adjudicate the litigation on sound constitutional principles. The inconsistencies of the court decisions promulgated by the "long hair" dispute have generated confusion and consternation among educators, not only on the status of hair, but over the whole area of student constitutional rights in general.

Undoubtedly, many school officials view the regulation of student grooming as an area of no concern of the courts, state or federal. They feel judicial intervention on such a "minor" controversy is an infringement of their administrative prerogatives. However, the "long hair" controversy takes on a very serious note where students are denied attendance in schools that promulgate rules banning excessively long hair. The courts, therefore, became involved in the controversy because of the serious consequences imposed on students who insisted on wearing their hair long.

Can a male student wear his hair as long as he wants to in a public school? The answer to the query depends upon where the student lives. The First, Seventh, and Eighth Circuit Courts have ruled in favor of the student

\(^3\) Richards v. Thurston, 424 2d 1281 (1970)
while the Fourth, Fifth, Sixth, Ninth and Tenth Circuit Courts have upheld school regulations prohibiting long hair.

The beginning of this legal controversy can be traced back to the 1965, Leonard v. School Committee of Attleboro decision by the Supreme Judicial Court of Massachusetts. Leonard, a high school student who claimed his "Beatle-type" hair cut was essential to his performance in a band, was suspended by Attleboro school officials until he cut his hair shorter. Leonard contended the school's action was unreasonable and arbitrary, and that "long hair" was in no way connected with the successful operation of a public school.

The Massachusetts Court, however, ruled in favor of the board's action stating, "The Court's function in reviewing this type of ruling is limited in the light of the broad discretionary powers which the law confers upon a school committee. We will not pass upon the wisdom or desirability of a school regulation." The Court concluded its reasoning by saying that, "We are of opinion that the unusual hair style of the plaintiff could disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress. Thus as with any unusual,

4. 212 N.E. 2d 468 (1965)
5. Ibid., p. 472.
immodest or exaggerated mode of dress, conspicuous departures from accepted custom in the matter of haircuts could result in the distraction of other pupils."^6

As male long hair styles became more and more common in the late sixties, suspensions began to increase. Recognition by the federal courts of student constitutional rights through the due process clause of the Fourteenth Amendment resulted in appeals by suspended students to hear their cases on constitutional grounds. As a result, Federal District Courts have been inundated with "long hair" cases. A significant number of "long hair" cases have also reached Circuit Courts of Appeal, the court level directly below the Supreme Court of the United States. The highest court has yet to rule on "long hair" in the public schools and they specifically ruled out long hair and dress codes as an issue on the landmark Tinker decision in 1969. The decisions rendered by the Appellate Courts, pro and con, will now be reviewed.

Appellate Court Decisions Favoring Students

Court decisions holding in favor of students in "long hair" disputes have centered essentially around two points. The most recent First Circuit Court of Appeals decision, Richards v. Thurston, 1970, on "long hair" rejected the

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6. Ibid.
notion that a student's right to wear long hair is a constitutionally protected act of symbolic expression under the First Amendment or a Griswold "right to privacy". Instead, the Court, in ruling against school officials' restrictions on hair length, stating that, "We believe that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interest." 7

The Court went on to say that regulating the style of one's hair was not a legitimate state interest. The Court continued by pointing out that, "...Liberty seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty." 8 Finally, in Richards the Court said, "We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." 9

The Seventh Circuit Court of Appeals in its most recent "long hair" decision, 10 followed an earlier Seventh

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8. Ibid.
9. Ibid., p. 1285.
Circuit decision, *Breen v. Kahl*,¹¹ 1969. Because of his long hair, Tyler Crews was denied admission to North Central High School in Marion County, Indiana. Holding in favor of the student, the Court reasoned, "...[S]ince the impact of hair regulations extends beyond the schoolhouse gate, the degree of state infringement on personal rights is significantly greater than in many other areas of school discipline."¹² In *Crews*, the school officials failed to satisfy a burden of substantial justification required before a state may impinge upon a person's liberty. The fact that one's hair could not be worn short in school and long out of school was an important factor in a favorable decision for Tyler Crews.

Another reason used by a Federal Circuit Court where litigation was favorable to a student in a "long hair" controversy has been the extension of the *Griswold* right to privacy found in the Ninth Amendment. The Eighth Circuit recently rejected both the First and Seventh Circuit Courts' arguments and applied the *Griswold* formula which would not allow school rules to regulate a student's hair style because it violated his constitutional right to privacy. *Bishop v. Colaw*, mentioned earlier in Chapter Nine, stated, "We believe that, among those rights retained by

the people under out Constitutional form of government, is
the freedom to govern one's personal appearance."13 Lower
federal courts, in addition to the Federal Appeals Courts,
have applied the First Amendment14 and the equal protec-
tion clause of the Fourteenth Amendment15 in striking down
rules and regulations prohibiting "long hair" in the public
schools.

Appellate Court Decisions Favoring School Boards

Federal Circuit Courts of Appeal that have ruled in
favor of school officials in the "long hair" dispute cen-
ter their reasoning essentially around the points that the
regulation of grooming codes should be resolved by school
administrators, not the courts, and any evidence of dis-
ruption justifies upholding the school board rule in order
to protect the orderly process of education. In a 1970
decision, Jackson v. Dorrier,16 the Sixth Circuit Court
upheld a suspension of a high school pupil in Nashville,

13. 450 F. 2d 1069, 1075 (1971); see also: Crews v.
Clonces, 432 F. 2d 1259 (1970)

14. See: Finot v. Pasadena City Board of Education,
250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967); Meyers v.
Arcata Union High School District, 269 Cal. App. 2d 549,
65 Cal. Rptr. 68 (1969)

Griffin v. Tatum, 300 F. Supp. 60 (1969); Westley v. Rossi,

Tennessee for wearing long hair, stating:

In the absence of infringement of constitutional rights, the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee. 

Jackson, the high school pupil involved in the controversy, denied his long hair was an act of expression, thereby removing any question of First Amendment protection.

In a more recent decision, the Sixth Circuit Court of Appeals said, "The argument that the right of a student to determine his own hair length is a matter of substantive due process is without merit...").

The Fifth Circuit Court of Appeals saw "long hair" as a minor problem compared to the awesome difficulties involving southern schools recently ordered to desegregate. Concerning litigation reaching the Fifth Circuit Court over the suspension of three Negro students who refused to shave, they said, "The case is such that the District Court felt somewhat put-upon by having to fit a controversy over shaving into an inordinately busy schedule. It was viewed as a problem for school administrators. We share this view. The

17. Ibid., pp. 218-219.
entire problem seems miniscule in light of other matters involving the school system. The rule in question is founded on a rational basis, and that it was not arbitrarily applied. It follows that no substantial federal constitutional question was presented. There the matter ends.\textsuperscript{20} The Fifth Circuit Court of Appeals has consistently used the same reasoning in other "long hair" cases they have adjudicated.\textsuperscript{21}

The Tenth Circuit Court of Appeals also recently ruled in favor of upholding regulations restricting the length of male students' hair.\textsuperscript{22} Their reasoning is basically the same as other Federal Circuit Courts of Appeal that have ruled in favor of school boards. The Court in\textit{ Freeman v. Flake} stated, "We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures."\textsuperscript{23} In dismissing the litigation in\textit{ Freeman}, the Court declared, "The hodgepodge references to many provisions of the Bill of Rights and the Fourteenth Amendment show uncertainty as to the

\begin{tabular}{l}
20.\textit{ Ibid.}, p. 1158.  \\
22.\textit{ Freeman v. Flake}, 448 F. 2d 258 (1971)  \\
\end{tabular}
existence of any federally protected right."

Finally, the Tenth Circuit Court said of "long hair" cases, "Complaints which are based on nothing more than school regulations of the length of a male student's hair do not directly and sharply implicate basic constitutional values and therefore, should not be subject to constitutional protection."

The Tenth Circuit Court followed similar reasoning of the Ninth Circuit in King v. Saddleback Junior College, 1971, in deciding against students in the "long hair" dispute.

Summary

Unfortunately, both for public school administrators and the courts, the "long hair" problem continues to grow. Beards, sideburns, and longer hair seem to be an acceptable norm in some parts of the country. The pressure on schools seeking to prevent these styles of grooming is mounting. The courts, as seen, are still unable to resolve the controversy. Students are still suspended from school for violations of grooming codes and the courts are hearing more cases. It would appear the Supreme Court will have to step in and resolve the dilemma one way or the other for the federal courts are so sharply divided on the whole "long hair" issue.

24. Ibid., p. 260.
25. Ibid., p. 262.
26. 445 F. 2d 932 (1971)
The United States Court of Appeals, Eighth Circuit, recently complained that the Supreme Court has on several occasions refused to review the constitutional question of "long hair" regulations.\(^{27}\) The justices further stated, "What little guidance we have from the Court in this area is conflicting."\(^{28}\) A clear-cut ruling on the status of "long hair" would be of great benefit to the area of student constitutional rights for it would end a well publicized legal controversy the courts have thus far been unable to settle.

\(^{27}\) Bishop v. Colaw, 450 F.2d 1069, 1071 (1971)

\(^{28}\) Ibid.
CHAPTER XI
CONCLUSION

Impact on Students

The growth and expansion of constitutional rights to include students is having a broad impact on public schools today. Students, by virtue of various court decisions, may exercise their right to free expression in school. Symbolic acts of protest, demonstrations, and speech are all constitutionally protected rights of public school pupils. Limits on these rights will be determined by the material and substantial disruption test proscribed by Tinker in most cases. If in the exercise of free expression a student materially and substantially disrupts the educational process then such expression may be restricted.

The right of a student to be guaranteed freedom of the press has also become a student constitutional right. Students today may print and distribute in and around schools pretty much what they choose. The courts have consistently held that student expression in a newspaper is their constitutional right and that student newspapers should be governed by the same guidelines as all newspapers.

Constitutional protections such as these are allowing students to voice their concerns over things they do not like. In addition to broad social and political issues, students are expressing discontent over the schools they attend. They are making their voices effectively heard on such things as dis-
cipline, dress, teachers, physical environment and the curriculum. One result has been more student participation in the decision making process in public schools.

Judicial recognition that students have certain rights, places an additional measure of responsibility upon the students. In the exercise of a pupil's right to free expression, for example, he now has the responsibility of not infringing upon the rights of others. Also, in the exercise of the right to a free press, students have the responsibility of maintaining the recognized ethics of journalism. Any means that would allow students the opportunity of assuming a greater burden of responsibility should be welcomed by educators. What other way can best prepare adolescents to make the tremendous decisions of choosing a mate for marriage, a college, or an occupation? Students used to responsibilities will be able to make sounder, more mature decisions upon the termination of their public school experience.

The inclusion of procedural due process rights to be constitutionally protected rights of students has also had a tremendous impact on students. Students today have been afforded rights that give them considerable protection before they can be expelled or suspended for long periods of time from school. Legal counsel is also being made available to students by organizations such as the American Civil Liberties Union to insure that a student's constitutional rights are not violated when they are suspended. No longer can
public school pupils be summarily expelled at the arbitrary will of school officials. The Fifth and Sixth Amendment procedural due process rights guarantee students facing expulsion and long term suspensions today fundamental fairness.

Impact on School Officials

The impact of student constitutional rights has certainly been evident to school officials. A main concern of teachers, administrators, and school board members is the feeling that court decision granting students constitutional rights will undermine their authority and control over students. Discipline in a public school is necessary, many maintain, before the educational process can even begin.

A close examination of court decisions on student rights indicates clearly the justices have gone at great length to point out that they are not trying to usurp the powers of school administrators. The courts realize the tremendous problems school administrators have today in running the public schools. They have taken great care to emphasize that any attempts to disrupt the educational process will not be tolerated. Many courts have commented on the merits of control and discipline in the public schools as a necessary part of the educational process. What the courts are saying, however, is that all pupils must be treated justly, fairly, and reasonably by school officials.

Pedagogical and legal philosophies clash, not on the fundamental idea that there must be authority, control, and
discipline in public schools, but on the degree of authority—authority that can allow arbitrary restrictions on a student's fundamental rights.

If school officials treat students justly, fairly, and reasonably the courts, organization such as the National Association for the Advancement of Colored People, the American Civil Liberties Union and various neighborhood legal aid groups will be satisfied. Recommendations by the American Civil Liberties Union, the American Association of University Professors, The National Association of Secondary School Principals, and the Massachusetts State Department of Education suggest a reexamination of attitudes by school administrators toward student rights. Thus, a conscientious effort by public school administrators to foster, not merely tolerate student rights will go a long way in keeping them out of court.

Recognition of student constitutional rights has direct implication for the classroom teacher. Students who


choose to voice their opinions in a constructive manner in the classroom can no longer be considered as recipients of a one-way education. The idea that education is totally teacher directed and teacher oriented is being replaced by free and open discussions and an exchange of ideas. The result should be a better education for students and teachers seeking this process.

The advent of student constitutional rights also raises the issue of accountability. Students with the constitutional right to criticize, protest, and demonstrate can point out to the general public problem areas in the schools. Administrative decisions are now subject to free and orderly discussion by students which makes the administrator more accountable for his actions. Teachers, too, feel the pressure of accountability due to students voicing their concerns. Such things as poor teaching have come under constant attack by students. Notwithstanding, the general public becomes aware of these concerns through the media, thereby keeping them better informed of what is happening in the public schools.

The extension of procedural due process rights has had broad administrative implications regarding student expulsions and long term suspensions. School officials may no longer expel or suspend students without following certain procedures designed to guarantee students fundamental fairness. Now administrators seeking to expel a student must conduct an investigation, gather evidence on both sides, give notice of the charges, and provide for a fair hearing.
School boards will have to devote time hearing expulsion cases and judge them fairly and impartially. Adherence to these due process procedures will inevitably be time consuming to school officials. However, the courts feel the inconvenience to school officials is worth protecting the students' rights.

A federal judge in a recent decision suggested that school officials should not just tolerate student constitutional rights but that they should foster them. Hopefully, in the future with a greater understanding of this body of law, school officials will choose to foster rather than to resist or merely tolerate student constitutional rights, and this, in turn, may lead to a more meaningful and satisfying experience for all those involved.

The Need for Further Research

The number of court decisions in the field of student constitutional rights has been increasing substantially each year. Continued research on this topic will be necessary just to keep abreast of the judicial interpretations of the various controversies.

There is also a need for research in closely related areas to the expansion of student constitutional rights to public school pupils through the due process clause of the Fourteenth Amendment. The equal protection clause of the Fourteenth Amendment, for example, has important implications for student constitutional rights and should be examined.
In the last four years President Nixon has made four appointments to the Supreme Court. The President has made it clear that he has sought justices whose legal philosophies are "conservative" or "strict constructionist" as opposed to the "liberal" ideals of the Court in the Warren Era. It remains to be seen what impact, if any, the recent appointees will have on student constitutional rights. Further research will be necessary to answer this question.

Finally, further research is needed on the topic of student constitutional rights that will contribute to a better understanding of this whole area of law, an understanding that is becoming more necessary for those in the field of public education today.


**PAMPHLETS**


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